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In the Supreme Court of the United States

OCTOBER TERM, 1983

SHELL OIL COMPANY,

Petitioner,

V.

MARY OLSEN, ARGONAUT INSURANCE COMPANY, CHRISTINE W. CARVIN, and GORDON DAVIS WALLACE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner applies for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit for review of the following questions:

I. Whether the Court of Appeals erred as a matter of law in granting the LHWCA compensation carrier an award larger than that amount for which petitioner was held liable in tort to certain of the claimants?

(a) In an action by the LHWCA compensation carrier against a vicariously liable third-party tortfeasor for reimbursement for workmen's compensation benefits paid, whether the LHWCA compensation carrier is entitled to an award in excess of the judgment in tort against the third-party tortfeasor? or

(b) Whether the vicariously liable third party tortfeasor's liability to the LHWCA compensation carrier for reimbursement of workmen's compensation benefits paid is limited to the amount of the tort award against the third party tortfeasor?

II. Whether the Court of Appeals erred as a matter of law in obligating petitioner to assume responsibility for administration and distribution of all of the LHWCA compensation carrier's future workmen's compensation liability to claimants arising out of the casualty?

III. Whether the Court of Appeals erred as a matter of law in awarding claimants prejudgment interest in an action arising under the Outer Continental Shelf Lands Act?

STATEMENT OF INTERESTED PARTIES

I, John O. Charrier, Jr., counsel of record for Petitioner, Shell Oil Company, certify that the following listed persons have or may have an interest in the outcome of this case:

1. Shell Oil Company and Travelers Insurance Company

2. Movible Offshore, Inc., Teledyne Movible Offshore, Teledyne Inc., and Pacific Indemnity Company

3. Argonaut Insurance Company

4. Mary Olsen

5. Christine Carvin

6. Gordon Davis Wallace

JOHN O. CHARRIER, JR.
ROBERT T. LEMON, II

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SHELL OIL COMPANY,

Petitioner

versus

MARY OLSEN, CHRISTINE W. CARVIN, GORDON W. WALLACE, and ARGONAUT INSURANCE COMPANY

Respondents

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

This matter has had a complex and tortured legal history. The matter was first tried, and all appeals exhausted, on liability. The damages issue was then tried, and this application pertains to that issue.

LIABILITY

DISTRICT COURT—

1. The opinions of the United States District Court for the Eastern District of Louisiana [Minute Entry (June 6, 1974) and Minute Entry (July 15, 1975) are not reported.

COURT OF APPEALS—

2. *Olsen v. Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977), *rehearing en banc denied*, 565 F.2d 163 (5th Cir. 1977) [initial decision on liability affirming negligence of Movible Offshore, Inc.]

3. *Olsen v. Shell Oil Co.*, 574 F.2d 194 (5th Cir. 1978) [certification to Louisiana Supreme Court of questions of Louisiana strict liability and its effect on Shell Oil Co.]

4. *Olsen v. Shell Oil Co.*, 365 So.2d 1285 (La. 1978) [certified questions answered finding Shell Oil Co. strictly (vicariously) liable]

5. *Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir. 1979) [final decision on liability]

QUANTUM (DAMAGES)

DISTRICT COURT—

6. The opinion of the United States District Court for the Eastern District of Louisiana [minute entry (April 22, 1982)] is not reported.

COURT OF APPEALS—

7. *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), *rehearing en banc denied* (September 26, 1983)

JURISDICTION

This appeal raises questions of law under the United States Longshoremen's and Harbor Workers' Compensation

Act, 33 U.S.C. §901 *et seq.*, and the Outer Continental Shelf Lands Act, 43 U.S.C. §1333 *et seq.*

The decision of the United States Court of Appeals for the Fifth Circuit at issue was entered on July 5, 1983. The Application for Rehearing En Banc was denied by the Court of Appeals in an order entered on September 26, 1983.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This Petition raises issues under the following provisions of the United States Longshoremen's and Harbor Workers' Compensation Act [LHWCA] and the Outer Continental Shelf Lands Act [OCSLA]:

LHWCA 33 U.S.C. §933

> **§933. Compensation for injuries where third persons are liable**
>
> **(a) Election of remedies.** If on account of a disability or death for which compensation is payable under this Act, the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
>
> **(b) Acceptance of compensation acting as assignment.** Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner of Board shall operate as an assignment to the employer of all right of the

person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

(c) Payment into section 944 fund operating as assignment. The payment of such compensation into the fund established in section 44 [33 U.S.C.S. §944] shall operated as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Institution of proceedings or compromise by assignee. Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Recoveries by assignee. Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 7 [33 U.S.C.S. §907];

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7 [33 U.S.C.S. §907], to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

(f) Institution of proceedings by person entitled to compensation. If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) [subsec. (b) of this section] the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) Compromise obtained by person entitled to compensation. If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if the written approval of such compromise is obtained from the

employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

(h) Subrogation. Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be surbrogated to all the rights of the employer under this section.

(i) Right to compensation as exclusive remedy. The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

(Mar. 4, 1927, ch 509, § 33, 44 Stat. 1440; June 25, 1938, ch 685, §§ 12, 13, 52 Stat. 1168; Aug. 18, 1959, P.L. 86-171, 73 Stat. 391; Oct. 27, 1972, P.L. 92-576, § 15(f)-(h), 86 Stat. 1262).

OCSLA 43 U.S.C. §1333

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction. (1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or

temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this Act.

(2) (A) To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after the date of enactment of this subparagraph [enacted Sept. 18, 1978], the President shall establish procedures for setting [setting] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States

shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshoremen's and Harbor Workers' Compensation Act applicable; definitions. With respect to disability or death of an employee resulting from any injury occurring as the result of operations, conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.S. §§901 et seq.] For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.S. §§901 et seq.] under this section—

(1) The term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

This Petition also raises issues under the Federal Interst Statute:

Federal Interest Statute 28 U.S.C. §1961

§1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

STATEMENT OF THE CASE

On May 6, 1970, several persons were either killed or severely injured when a water heater exploded in the living quarters (offshore modular unit) of a fixed drilling platform. Movible Offshore, Inc. ("Movible") was the owner of the water heater and the offshore modular living quarters. Movible was also the employer of those injured or killed in this explosion. The fixed drilling platform was owned by Shell Oil Company ("Shell"), and was located on the Louisiana Outer Continental Shelf.

Following this casualty, Argonaut Insurance Company, Movible LHWCA's workmen's compensation carrier, paid compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* These compensation benefits were paid without entry of a formal award by the Deputy Commissioner, because Movible did not contest the claimants' right to compensation. Thereafter, Argonaut filed suit against Shell Oil Company and other defendants, seeking reimbursement for the workmen compensation benefits paid to the claimants and other Movible employees injured as a result of the explosion. Several of those injured, as well as the representatives of those killed, also filed separate suits against Shell Oil Company and other defendants.[1]

On June 6, 1974, and again on July 15, 1975, Chief Judge Frederick J. R. Heebe of the United States District Court for the Eastern District of Louisiana, rendered judgment in these consolidated actions on the issue of liability in favor of Shell Oil Company. The District Court found that the active negligence of Movible was the proximate cause for the explosion and resulting injuries and deaths.

On appeal, *Olsen v. Shell Oil Co.*, 561 F.2d 1178 (5th Cir. 1977), *reh. en banc den.*, 565 F.2d 164 (5th Cir. 1977), the United States Court of Appeals for the Fifth Circuit

[1] The plaintiffs in these consolidated cases are: (a) Mrs. Mary Olsen on behalf of the children of her marriage to the deceased Kenneth Mahaney, suing for the wrongful death of Kenneth Mahaney; (b) Mrs. Christine W. Carvin, on behalf of herself and the children of her marriage to the deceased Joseph P. Carvin, suing for the wrongful death of Joseph R. Carvin; (c) Mr. Gordon D. Wallace, suing in his own right for personal injuries; (d) Argonaut Insurance Company, Movible's workmen's compensation carrier, suing for reimbursement of workmen's compensation benefits paid to several claimants injured or killed, noninclusive of Mahaney, Carvin and Wallace. Argonaut intervened as a party plaintiff in these three actions.

affirmed the District Court's findings and conclusions that the explosion was proximately caused by the active negligence of Movible. However, the Court of Appeals then certified to the Louisiana Supreme Court certain questions of Louisiana law,[2] and its effect on Shell Oil Company as owner of the platform. *Olsen v. Shell Oil.*, 574 F.2d 194 (5th Cir. 1978). The Louisiana Supreme Court, *Olsen v. Shell Oil Co.*, 365 So.2d 1285 (La. 1978), contrary to then-established precedent, extended the doctrine of Louisiana strict liability and resolved the certified questions against Shell Oil Company, and concluded that Shell Oil Company was strictly (vicariously) liable, as owner of the fixed drilling platform, for the explosion and resulting injuries and deaths, notwithstanding that the active negligence of Movible was the proximate cause of the casualty.

Thereafter, the United States Court of Appeal, *Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir. 1979), resolved the remaining questions of liability, and remanded these consolidated cases to the District Court for trial on the issue of quantum (damages).

The issue of quantum was tried by Special Magistrate on December 18-21, 1979. On June 29, 1981, the Special Magistrate entered its proposed findings and recommendations. Thereafter, the United States District Court for the Eastern District of Louisiana, Chief Judge Frederick J. R. Heebe, affirmed and modified the Special Magistrate's proposed findings and recommendations by minute entry dated April 22, 1982. The District Court found Shell Oil Company liable in tort in an amount less

[2] Included among the questions was the Louisiana tort doctrine of strict liability under the Louisiana Civil Code Art. 2322, and its application to the owner of a fixed drilling platform located on the Louisiana Outer Continental Shelf.

than the total workmen's compensation benefits paid by Argonaut to the injured claimants and the decedents' representatives.[3] Nevertheless, the District Court held that Argonaut, as the LHWCA workmen's compensation carrier, was entitled to complete reimbursement from Shell Oil Company for all workmen's compensation benefits paid in the past, as well as all workmen's compensation benefits to be paid in the future.

On appeal, *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment and award on the issue of quantum. Specifically, the Court of Appeals affirmed the District Court's holding (1) that Shell Oil Company was to completely reimburse Argonaut for all workmen's compensation benefits paid to the claimants, notwithstanding that Shell Oil Company's liability in tort to these claimants was less than those amounts paid as workman's compensation benefits; and (2) that Shell Oil Company was to assume the administrative responsibility for payment of any and all workmen's compensation benefits and medical expenses which would have to be paid to these claimants in the future. The United States Court of Appeals for the Fifth Circuit thereafter denied rehearing en banc on September 26, 1983.

Shell now petitions for a writ of certiorari from this judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

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[3] For example, the District Court awarded Mary Olsen only $16,000. However, Argonaut's compensation obligation to the Olsen family was much greater than this amount.

ARGUMENT

I. THE COURT OF APPEALS DECISION IS CONTRARY TO THE STATUTORY PROVISIONS OF THE LHWCA AND THE DECISIONS OF THIS COURT INTERPRETING THAT STATUTE.

Petitioner, Shell Oil Company's liability is encompassed by a single judgment in tort for damages in each of the personal injury and death cases; accordingly, petitioner's liability to the LHWCA compensation carrier (Argonaut) for reimbursement of workmen's compensation benefits paid to claimants is limited to the amount of the tort judgment. The Court of Appeals' decision to the contrary is in direct conflict with the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*

It is an elementary principle of workmen's compensation law that the compensation lien comes out of the judgment—the injured employee is permitted to retain the compensation subject to reimbursement to the employer out of the tort damages collected from the negligent third party tortfeasor. LHWCA §33(b,e,h), 33 U.S.C. §933 (b,e,h). *Haynes v. Rederi and A/S ALADDIN,* 362 F.2d 345 (5th Cir. 1966); *Brock v. Baroid Div., National Lead Co.,* 339 F.Supp. 728 (W.D. La. 1972). See also *Caldwell v. Ogden Sea Transport, Inc.,* 618 F.2d 1037 (4th Cir. 1980). A corollary to this principle is that the negligent third party tortfeasor can never be held liable for reimbursement to the compensation carrier for more than the amount of damage for which it is held liable in tort. *Hinson v. S/S PAROS,* 461 F.Supp. 219, 223 (S.D. Tex. 1978). See LHWCA §33(b,e,h), 33 U.S.C. §933 (b,e,h). Thus, LHWCA compensation carrier

Argonaut's compensation lien is limited to the amount of the tort judgment against third party Shell Oil Company. *Hinson v. S/S PAROS*, 461 F.Supp. 219, 222-23 (S.D. Tex. 1978).

LHWCA §33 (33 U.S.C. §933) governs the rights of the employee, the employer, and the compensation carrier against third persons whose negligence was the cause for the employee's injury. Section 33 of the Act grants the employer (or the employer's compensation carrier) the right to bring an action for reimbursement against the third person in those instances where the employee fails to bring such an action on his own behalf. See LHWCA §33(e & f), 33 U.S.C. §933 (e & f). It is plain from the face of the statute that the negligent third party tortfeasor's liability is encompassed and limited by the tort damages due the employee. Compare LHWCA §33 (b,e,f,h,i), 33 U.S.C. §933 (b,e,f,h,i) with LHWCA §5(a), 33 U.S.C. §905(a).

This Honorable Court has held that the objective of the reimbursement provisions of the LHWCA [§33 (33 U.S.C. §933)] is that "of placing the burden ultimately on the company whose fault caused the injury." *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 324 84 S.Ct. 748, 754 (1964). See *Federal Marine Terminals Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 420 n.22, 89 S.Ct. 1144, 1153 n.22 (1969). Thus the intent of §33 is to force the actively negligent third party which causes injury to reimburse the non-negligent employer (or the employer's compensation carrier) whose only responsibility for the injury is the compensation liabilitly imposed by the statute. See LHWCA §5, 33 U.S.C. §905.

The decision of the United States Court of Appeals for the Fifth Circuit in this instance is completely contrary

to the objective of LHWCA §33. The Court of Appeals decision permits the employer (or the employer's compensation carrier) to recover from the third party tortfeasor over and above that to which the third party tortfeasor is held liable in tort. Moreover, the Court of Appeals decision permits the employer (or the employer's compensation carrier) to recover in excess of the tort judgment against a *non-negligent* vicariously liable third party. The decision of the Court of Appeals does not "place the burden ultimately on the company whose default caused the injury", particularly in this instance where the negligent party was the claimants' LHWCA employer, Movible. Therefore, petitioner submits the Court of Appeals decision is completely without statutory authority, nor is it in compliance with the statutory objective of the LHWCA.

Nor is the Court of Appeals decision compatible with the decision of this Honorable Court in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S.Ct. 1144 (1969). There, the United States Supreme Court held LHWCA §33 was not the exclusive source of the employer's remedies against negligent third parties for reimbursement of workmen's compensation benefits. In *Burnside*, this Honorable Court held that the employer (or his compensation carrier) could proceed against the *negligent* third party on the theory that the third party breached some duty owed directly to the employer. The *Burnside* remedy applies only to actively negligent third party tortfeasors; the *Burnside* remedy does not apply to the vicariously liable third party, particularly where the actively negligent party is the LHWCA employer. Moreover, the *Burnside* remedy is limited to those situations where state law limits recovery in tort (the applicable Louisiana

law in this instance imposes no such limitation).[4]

The Court of Appeals decision is contrary to *Burnside*. Unlike the situation in Burnside, Shell Oil Company breached no independent duty owed LHWCA employer Movible, or its compensation carrier, Argonaut. Instead, this casualty was proximately caused by the active negligence of the LHWCA employer, Movible. Petitioner, Shell Oil Company, only was found strictly (vicariously) liable under a strained interpretation of Louisiana law.[5] Therefore, petitioner submits the Court of Appeals erred in holding a non-negligent, vicariously liable third party liable for workmen's compensation benefits in excess of the tort judgment against said third party. Therefore, petitioner submits the Court of Appeals decision has no statutory or jurisprudential basis, and that the Court of Appeals decision should be reversed.

II. THE LHWCA IMPOSES NO OBLIGATION ON THE THIRD PARTY TORTFEASOR TO ASSUME THE ADMINISTRATIVE RESPONSIBILITY FOR THE DISBURSEMENT OF FUTURE WORKMEN'S COMPENSATION BENEFITS. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN OBLIGATING PETITIONER TO ASSUME THE ADMINISTRATION OF FUTURE WORKMEN'S COMPENSATION CLAIMS AGAINST THE COMPENSATION CARRIER ARGONAUT.

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[4] On its facts, *Burnside* applies only to those actions between the vessel and the stevedore-employer, and is based exclusively on federal maritime law. In the instant action, the injuries and deaths occurred on a fixed drilling platform located on the Louisiana Outer Continental Shelf; the applicable law is Louisiana law, adopted as surrogate federal law pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. §1333.

[5] Louisiana Civil Code Art. 2322.

The District Court imposed upon petitioner the obligation to undertake the payment and administration of the existing claims against Argonaut for workmen's compensation arising out of the casualty; the Court of Appeals affirmed this decision. In effect, the judgment forces petitioner, an oil company, to enter into the business of an American casualty insurance company. Under the Court of Appeals' decision, petitioner will now have to assume the burden of issuing weekly compensation checks, paying the various medical bills which are submitted by the claimants, and monitoring the continued viability of the compensation claims. Such judicial action on the part of the Court of Appeals is without statutory authority, and imposes an unreasonable financial and administrative burden upon petitioner.

Moreover, the Court of Appeals decision imposes a greater obligation than the straightforward award of a money judgment to the compensation carrier; instead, the Court of Appeals decision additionally (and improperly) places the cost of administration of the compensation claims on petitioner, rather than the compensation carrier. Nowhere does the LHWCA authorize the employer/compensation carrier to recover (in addition to the workmen's compensation benefits) the cost of administration of the compensation claims from the third party. The statutory scheme behind LHWCA makes clear that the compensation carrier will continue to be liable to the workmen's compensation claimants for future benefits, even in the case of the claimants' successful suit against a third person for money damages, and even in the case of the compensation carrier's successful suit for reimbursement against the negligent third person. See LHWCA §33(f), 33 U.S.C. §933(f). Thus, the statute places the on-going costs of administration of the compensation claim squarely on the

compensation carrier, not on the third party tortfeasor.

The Court of Appeals' decision affirming the District Court's judgment also works as an "open-ended judgment" against petitioner in that (1) it imposes an infinite period for which petitioner will be liable to pay damages, and (2) the judgment, as written, is not for a sum certain, contrary to well-established principles of tort law. In effect, the Court of Appeals has given the LHWCA compensation carrier "carte blanche" recovery against petitioner with respect to *any* future payments which Argonaut may decide to incur. The potential for abuse is readily apparent.

This "carte blanche" recovery for the LHWCA compensation carrier is completely contrary to the established view of the courts. The law does not permit an infinite period of liability for prospective damages; the law permits only a finite period, the reason being that only then can damages be calculated with any degree of reasonable precision. The "maintenance and cure" cases best illustrate this point. See *Farrell v. United States*, 336 U.S. 511, 519, 69 S.Ct. 707, 711 (1949); *Calamar S.S. Corp. v. Taylor*, 303 U.S. 525, 531, 58 S.Ct. 651, 655 (1938). In the "maintenance and cure" cases, the courts impose a limitation of "maximum cure" on the extent of the seaman's ability to recover maintenance and cure: the seaman can recover up until the point his condition reaches maximum cure. The rationale for this limitation on the seaman's recovery is that any damages beyond this period of maximum care are not capable of precise measurement.

The similarity of maintenance and cure to workmen's compensation logically dictates that the same rationale apply here—petitioner Shell should not be held liable beyond that period of time in which damages can be

calculated with reasonable precision. The prohibition against the award of speculative damages is well-settled. See *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562-63, 51 S.Ct. 248, 250 (1931); *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927). See also *Compania Pelineon De Navegacion S.A. v. Texas Petroleum Co.*, 540 F.2d 53, 55-56 (2d Cir. 1976); *Aldon Industries, Inc. v. Don Myers & Associates, Inc.*, 517 F.2d 188, 191 (5th Cir. 1975); *Travelers Indemnity Co. v. Peacock Construction Co.*, 423 F.2d 1153, 1157 (5th Cir. 1970).

Moreover, the Court of Appeals decision is without statutory basis; there is nothing in the LHWCA permitting the court to obligate petitioner to pay any and all claims for workmen's compensation benefits which might arise in the future. Nor is there anything in the statute permitting the court to obligate petitioner to administer the future workmen's compensation claims of the claimants. Indeed, there is contrary authority. See *Hinson v. S/S PAROS*, 461 F.Supp. 219, 223-24 (S.D. Tex. 1978) [compensation carrier barred from recovery of total projected amount of workmen's compensation benefits that would have to be paid in future]. Accordingly, petitioner submits the Court of Appeals decision obligating petitioner to assume the role of the compensation carrier is in error, and should be reversed.

III. THE COURT OF APPEALS DECISION AFFIRMING THE AWARD OF PREJUDGMENT INTEREST IN AN OCSLA CASE IS A COMPLETE DEPARTURE FROM CONTROLLING PRECEDENT ON THIS ISSUE, AND IS CONTRARY TO FEDERAL LAW AS APPLIED UNDER OCSLA.

Under the Outer Continental Shelf Lands Act, (OCSLA), 43 U.S.C. §1333 *et seq.*, federal law is the substantive law to be applied on the Outer Continental Shelf. The law of the adjoining state is to be applied only in the absence of an inconsistent federal law; where state law is found inconsistent, federal law, and not state law, is the applicable law for personal injury and death actions arising on the Outer Continental Shelf. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969). See *Gulf Oil Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 28 70 (1981); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). The *Rodrigue* mandate is clear: the existence of Federal law on a substantive issue bars the application of state law in resolving that issue; the federal law still is pre-eminent over state law when substantive rights on the Outer Continental Shelf are at issue. *Rodrigue*, 395 U.S. at 355-58, 89 S.Ct. at 1837-38.

There is controlling federal law on the subject of legal interest, which precludes application of the state interest statute (La. Rev. Stat. §13:4203). The federal interest statute, 28 U.S.C. §1961, provides:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshall, in any case where, by the law of the state in which such court is held, execution may be levied for interest on judgments rendered in the courts of this state. *Such interest shall be calculated from the date from entry of the judgment, at the rate* ... (emphasis added).

The Court of Appeals interpreting the federal interest statute in cases arising out of the Outer Continental Lands Act, have consistently held that the federal interest statute

absolutely precludes an award of prejudgment interest. *Musial v. A&A Boats, Inc.*, 696 F.2d 1149, 1154 (5th Cir. 1983); *Aymond v. Texaco, Inc.*, 554 F.2d 206, 211-12 (5th Cir. 1977); *Berry v. Sladco, Inc.*, 495 F.2d 523, 528 (5th Cir. 1974); *Evans v. Chevron Oil Co.*, 438 F.Supp. 1097 (E.D. La. 1977), *aff'd per curiam* 616 F.2d 565 (5th Cir. 1980). These courts of appeals holdings are clear and specific: prejudgment interest is not to be awarded in actions arising under the OCSLA; the federal interest statute precludes as a matter of federal law an award of prejudgment interest for cases arising on the Outer Continental Shelf. Such holdings are completely consistent with *Rodrigue's* mandate: federal law (28 U.S.C. §1961) is to control over state law (La. Rev. Stat. §13:4203), where the federal law is inconsistent with the state law.

Therefore, the Court of Appeals decision in the instant matter is simply inconsistent with previous precedent on this issue, and is certainly contrary to this Honorable Court's mandate in *Rodrigue v. Aetna Casualty & Surety Co.* Accordingly, petitioner submits that the Court of Appeals award of prejudgment interest in the instant matter should be reversed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify on this 17th day of November, 1983, that three copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to all counsel of record in this matter.

JOHN O. CHARRIER, JR.

83-828

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CLERK

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

SHELL OIL COMPANY,

Petitioner,

V.

MARY OLSEN, ARGONAUT INSURANCE COMPANY, CHRISTINE W. CARVIN, and GORDON DAVIS WALLACE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
VOL. I — APPENDIX A — G

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APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed: June 6, 1974

Minute Entry
June 6, 1974
Heebe, J.

MARY OLSEN, et al.	CIVIL ACTION
versus	NO. 72-1240
SHELL OIL COMPANY, et al.	SECTION B
CHRISTINE W. CARVIN, et al.	CIVIL ACTION
versus	NO. 70-2986
SHELL OIL COMPANY, et al.	SECTION B
FRANK WINSTON BOOKER, et al.	CIVIL ACTION
versus	NO. 71-894
SHELL OIL COMPANY, et al.	SECTION B
GORDON DAVIS WALLACE	CIVIL ACTION
versus	NO. 71-1144
SHELL OIL COMPANY, et al.	SECTION B
ARGONAUT INSURANCE COMPANY	CIVIL ACTION
versus	NO 71-1265
SHELL OIL COMPANY, et al.	SECTION B
	(CONSOLIDATED CASES)

On a previous day this case came on for trial on the issue of liability alone, and the Court, after hearing the evidence

and studying the briefs and memoranda filed by the parties, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On May 6, 1970, a hot water heater explosion occurred aboard a fixed platform owned by Shell Oil Company located in the Eugene Island Area, Block 259, in the Gulf of Mexico, off of the coast of Louisiana. The individual plaintiffs in this case are the legal representatives of men killed in the explosion, except for Gordon Wallace who sues for injury. The platform was designated as Shell's "C" platform and drilling was being conducted from the platform by a drilling contractor known as Movible Offshore, Inc. The individual plaintiffs were all employees of Movible Offshore, Inc. (Movible).

2. To conduct the drilling operations from the platform, Movible had located its modular and movable drilling rig on the platform. Movible designated the rig at this particular location as Movible Rig No. 4. Movible Rig No. 4 consisted of all equipment necessary to drill a well, including a derrick or mast, drawworks, the very large engines which were necessary to power the drilling equipment, and all normal appurtenances to a drilling operation. In addition to this, Movible had its modular living quarters on the Shell platform which provided a galley area for feeding the men, sleeping quarters, shower and bathroom facilities and a lounge area. This modular living unit was fully movable, and when the rig was moved from one platform to another, it was picked up as a unit by a derrick barge and then transported to the new site and duly placed on the platform in such a way that cutting and burning of metal would be required to remove it.

3. Under the working arrangement in effect between Shell and Movible, two Movible drilling crews consisting of six men each worked opposite shifts so that the drilling rig could be kept in operation 24 hours a day. Of the twelve men composing the two drilling crews, two were drillers, two were derrickmen, six were rotary helpers, and two were power plant operators.

In addition to these men, Movible also provided three roustabouts (charged with platform maintenance), one welder, one crane operator, and a commissary crew, e.g., several people charged with the duty of providing for the food service and the upkeep and maintenance of the interior of the living quarters. Shell performed none of the actual operations on the rig and had only one permanent representative there. He was provided quarters in the Movible modular living unit but concerned himself with observing the drilling operations conducted by Movible.

4. The living quarters module which Movible brought to the site was a complete and self-contained unit. It was built on skids so that it could be picked up as one unit and moved from platform to platform. The quarters unit was equipped with a galley and related dining area and living area. Additionally, the quarters unit was equipped with two electric water heaters. One water heater was located in the galley area and another was located in the pantry area. The pantry heater provided water to the showers while the galley heater, in the main, provided water to the galley equipment. These water heaters were Movible equipment and were wholly owned, as was the living quarters unit, by Movible Offshore, Inc.

5. On November 1, 1968, Pacific Employers Insurance Company (Pacific), an affiliate of the Insurance Company of

North America (INA), issued Standard Workman's Compensation and Employer's Liability Policy No. PWC 06502 to Movible Offshore, Inc. The policy period commenced at 12:01 a.m. on November 1, 1968 and terminated on November 1, 1969. The policy of insurance issued by Pacific to Movible contained the following language with respect to safety inspections:

> "The Company and any rating authority having jurisdiction by law shall each be permitted *but not obligated* to inspect at any reasonable time the work places, operations, machinery and equipment covered by this Policy. Neither the right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking on behalf of or for the benefit of the insured or others, to determine or warrant that such work places, operations, machinery or equipment are safe."
> (emphasis supplied)

6. Shortly after commencement of the policy period, INA officials, including its New Orleans Manager, Mr. H. K. Dulaney, participated in discussions with representatives of Movible, including the official responsible for its safety program, Mr. J. H. Brazier. The discussions focused on the services which would be rendered by INA in connection with its coverage. Mr. Gilbert J. Stansbury was introduced as the INA representative who would be handling the Movible account.

7. During this initial meeting, Dulaney informed Movible regarding INA's policy of "loss control," i.e., INA understood its obligation to be one of motivating the management of its insured to undertake a complete safety program on their own. INA would provide the company with brochures,

posters, films and information for use at safety meetings and would also make visitations to rigs for the purpose of pointing out unsafe practices and making recommendations for changes. Dulaney stated that INA was well aware that Movible had its own extensive safety program. Brazier replied that Movible was highly competent in promoting safety within their operations and expected INA to work within Movible's program.

8. Brazier informed Dulaney that every man on a Movible rig was considered a safety engineer and had safety responsibilities. Dulaney had the impression that each toolpusher had specific expertise in safety with respect to conditions which existed on the rigs. To encourage safety practices by the men and to prevent lost time accidents, Movible had an incentive program, awarding various prizes to the men with the best safety records. Movible held daily safety meetings before each crew went to work and weekly safety meetings in which all men on the rig participated. Movible officials also performed safety inspections on its rigs. Daily inspections took place under the direction of the Movible toolpusher and weekly visitations to the rigs were made by Movible's Drilling Superintendent and his assitant. The purpose of these inspections was to check machinery, safety equipment, safety reports and to fill out safety inspection reports. As a result of its extensive safety program, Movible won first place in the American Oil Well Drillers Association safety awards program during eight of the past nine years.

9. When Brazier inquired as to whether INA would inspect all of the rigs each month, Dulaney responded that INA could not undertake this type of inspection but that it would attempt to inspect the rigs on a periodic basis and transmit

its recommendations to Movible.

10. Throughout the policy period, Movible continued to perform safety inspections on its rigs including Movible Rig No. 4. The Court finds that INA represented to Movible and its officials that it would conduct periodic inspections of the rigs as a supplement or adjunct to Movible's continuing safety program.

11. INA's usual procedure to follow up safety recommendations made by its inspectors was to receive written replies from the insured indicating whether suggested action had been completed. Movible, however, never, or rarely, gave INA the requisite written report. This conduct led to the cancellation of INA's safety services for Movible. The routine of INA and Gilbert Stansbury, as far as Movible was concerned, was to make actual inspections to see whether previous safety recommendations had been complied with. In at least one other case, Mr. Stansbury discovered, during a follow up inspection, that his recommendations concerning a hot water heater temperature pressure relief device had not been followed. Thus, the evidence preponderates that INA undertook to check, by inspection, on compliance with its recommendations. The evidence further indicates that Movible, contrary to its representations about its own safety program, relied on INA to make actual inspections to secure compliance with Stansbury's safety recommendations instead of undertaking to check and report compliance on its own.

12. On January 22-23, 1969, Mr. Stansbury visited Movible Rig No. 4 for the purpose of viewing Movible's safety practices on the rig, including making a safety inspection. During his inspection, Stansbury was accompanied by the Movible toolpusher, Mr. Carroll Desormeaux.

13. Stansbury inspected the hot water heaters in the pantry and in the galley of the living quarters on the rig. At a safety meeting on the rig, Stansbury made several suggestions with respect to safety practices, including specific recommendations with respect to the heaters which recommendations were given in writing to the toolpusher, Desormeaux, and were later transmitted to Movible's management.

14. Stansbury recommended that the fusible plug relief valve be changed to a temperature pressure relief valve and that a procedure be established for weekly activation of the test lever on the temperature pressure relief valve to insure its proper working condition. This was a sound recommendation in accordance with standard manuals for plumbing codes. He also suggested that the valve on the galley hot water heater have its outlets piped to the outside to prevent injury or property damage if it were activated. Stansbury did not make any specific recommendations as to type or manufacturer other than to suggest that the valve was to be a combination temperature pressure relief valve for a hot water heater.

15. Movible failed to follow Stansbury's recommendations with respect to the valves. Movible's management comprehended the nature of Stansbury's recommendation. Prior insurers had made the same or similar suggestions and Stansbury had made the same suggestions during visits to other Movible rigs. However, those in charge of obtaining the proper valve apparently did not understand the recommendation. Movible's toolpusher, Desormeaux, had the impression that Stansbury had simply suggested that the valve be changed to provide for a drain line in order to prevent someone from being scalded in the event the valve were to "pop off."

Desormeaux failed to comprehend what the insurer had suggested although Stansbury's written recommendation makes it clear that INA wanted Movible to change to a combination temperature pressure relief valve.

16. When Desormeaux instructed Movible's purchasing agent, Mr. Ray Brashear, to obtain new valves, he told Brashear that he wanted a valve "with threads on the outside so I could run a line outside the living quarters." Desormeaux told Brashear the pressure setting he wanted for the valve and its size but did not give Brashear any temperature requirement for the valve. Most importantly, Desormeaux neglected to inform Brashear that the valves he requested were to be placed on hot water heaters. According to Brashear, the Movible toolpusher probably requested a "Texsteam" relief valve.

17. On January 29, 1969, Movible placed an order with the New Iberia area Texsteam distributor, Pneumatic Service & Equipment, Inc., (Pneumatic), for two 3/4 inch 5550 Texsteam relief valves set at 125 lbs. The relief valve which Movible ordered was delivered that same day by Pneumatic.

18. The relief valve which Movible ordered was a pressure relief valve only, not a temperature pressure relief valve as Stansbury had recommended.

19. The valves were replaced on February 3, 1969. Desormeaux inspected the heaters after the installation of the valves and concluded that "everything looked okay." Desormeaux's replacement, Mr. Wyman Haas, recalled being told by Desormeaux that Stansbury had recommended changing the pop-off valve. Haas looked at the heater after the install-

ation was completed and noted that the new valve was a Texsteam valve which had a little handle on the side. The valve appeared to be just like the one found in his home, and it looked all right to him.

20. On October 7, 1969, Stansbury returned to Rig No. 4 and interviewed the Movible toolpusher, Mr. Haas. At that time, at Movible's request, Stansbury was visiting the rigs via helicopter, reviewing the safety practices on three to five rigs per day. Stansbury reported that his previous twelve recommendations, including the one respecting the hot water heater valves, were completed. Stansbury could not recall whether or not he examined the heaters on October 7, 1969. Stansbury testified that if Toolpusher Haas had verbally assured him that the proper valve had been installed, Stansbury would have taken his word for it. Also, Stansbury testified that if he had made a visual inspection, he probably would have noticed that an improper relief valve had been installed. Accordingly, the evidence preponderates that no visual inspection was made but that, instead, Stansbury relied on Haas' verbal assurance that Stansbury's recommendation had been followed.

21. INA lost the Teledyne account, including Movible Offshore, Inc., during the year 1969. After the expiration of the policy period on November 1, 1969, INA/Pacific no longer provided coverage for Movible. Argonaut Insurance Company was Movible's insurer at the time of the casualty.

22. On May 6, 1970, the hot water heater located in the pantry of the living quarters aboard Movible Rig No. 4 exploded, resulting in the deaths and injuries for which damages are sought in this litigation. The evidence indicates that the

bottom of the hot water heater ruptured as a result of great pressure which built up in the tank. Then, the great explosive force was created when the water in the heater, which was "superheated" to a temperature of above its boiling point of 212 F., instantly "flashed" into steam when freed from the pressured confines of the tank and just as instantly expanded to more than 1,000 times its liquid volume. "Superheated water" would have had to be present for an explosion as powerful as this one to have occurred. Consequently, the evidence preponderates that, had a relief valve with temperature relieving capabilities been installed in the heater, it would not have exploded in such a fashion.

23. The heater was equipped with two heating elements, one inserted into the heater through a hole near the top, the other through a hole near the bottom. Each element was attached to a flange about four inches square. Each flange had holes through the corners by which the flange was intended to be bolted to the heater. When the flange was secured to the side of the heater, the protruding element would be immersed in the water. The temperature of the water was controlled by thermostats, one mounted near the flange at the top to regulate the heat of that element, the other mounted near the flange at the bottom to control the heat of that element. There was found attached to the heater after the accident a flange, mounted near the bottom hole, manufactured by "Thermalink," which was not a party to any of the lawsuits. No element was attached to it. A flange and element manufactured by defendant E. L. Wiegand under the name of "Chromolux" were found in the debris after the accident. A control manufactured by the defendant Therm-O-Disc was also found in the debris. Remnants of another control were also found but its manufac-

turer was not identified.

24. The plaintiffs' post trial brief admits, and the Court finds, that there has not been sufficient proof to connect either the Therm-O-Disc control or the Wiegand flange or hearing element with the explosion at issue in this case.

25. The evidence in this case certainly preponderates that this explosion could not have occurred had the Texsteam 5550 pressure relief valve properly relieved the pressure in the heater tank at 125 lbs. There is, however, no direct evidence that the valve was defective, and the Court is convinced that the circumstantial evidence in the case leaves open the reasonable possibility that the valve may not have relieved the pressure for reasons other than a defect in the valve itself. The Court notes that Mr. Harold L. Flettrich, the most credible expert to testify in the case, conceded that the "blockage" of the pressure relief system in this case could have been caused by 1) a defect in the piping; 2) scale building in the valve, combined with lack of use of the test lever by Movible personnel; 3) the misplacement of the valve below the check valve which prevented hot water from escaping from the tank back down the cold water line; 4) altered conditions in the functioning of the valve system due to a great heat buildup, especially when combined with a closed check valve and an opening reduced one half by scale accumulation.

26. Argonaut Insurance Company, Movible's compensation carrier at the time of the explosion, has intervened in all of these consolidated cases and has also filed a separate suit against the various defendants to recover monies paid on

behalf of injured parties who have filed no lawsuits against third parties. No formal compensation awards were rendered against Argonaut by the Commission.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over these consolidated cases pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333.

2. There is no evidence in this case to indicate that any negligence of Shell Oil Company was a proximate cause of the explosion.

3. Of course, Louisiana law, insofar as it does not conflict with federal law, is applicable to this case. Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969).

4. Under the facts of this case, Shell Oil Company is not liable to the plaintiffs pursuant to Art. 2322 of the Louisiana Civil Code. *See*, this Court's minute entry of May 14, 1973.

5. After much reflection, the Court is convinced that the Secretary of the Interior's regulations found at 30 C.F.R. § 250.45 and 30 C.F.R. § 250.46 do not, under the facts of this case, create an implied cause of action against Shell Oil Company. Those regulations read as follow:

> "The Outer Continental Shelf Lands Act enacted on August 7, 1953, authorizes the Secretary of the Interior at any time to prescribe and amend such rules and regulations as are appropriate and

necessary for the regulation of oil leases on the Outer Continental Shelf. Pursuant to this enabling legislation, the Secretary has promulgated the following rules:

"§ 250.45 Accidents, fires, and malfunctions.

"In the conduct of all its operations, the lessee shall take all steps necessary to prevent accidents and fires, and the lessee shall immediately notify the supervisor of all serious accidents and all fires on the lease, and shall submit in writing a full report thereon within 10 days. The lessee shall notify the supervisor within 24 hours of any other unusual condition, problem, or malfunction.

"§ 250.46 Workmanlike operations.

"The lessee shall perform all operations in a safe and workmanlike manner and shall maintain equipment for the protection of the lease and its improvements, for the health and safety of all persons, and for the preservation and conservation of the property and the environment. The lessee shall take all necessary precautions to prevent and shall immediately remove any hazardous oil and gas accumulations or other health, safety or fire hazards."

It is true, as a general proposition, that "a civil remedy may be implied for those clearly within the protective realm of legislation or regulations in the public interest." Euresti v. Stenner, 458 F.2d 1115, 1119 (10th Cir. 1972); Gomez v.

Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969). *See* Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv.L.Rev. 285 (1963). The workers in this case were not clearly within that protective realm, however, since it appears that the regulations in question were not meant to apply to the housing module involved in this case. The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(e)(1), provides that

> "The head of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the islands and structures referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary."

The authority for the regulations involved in this case derives from 43 U.S.C. § 1334 (a)(1), which provides:

> "(a)(2)[1] The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and notwithstanding any

> other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production."

Both the wording of the statutes and regulations, and the legislative history of the statutes, indicate that the authority of the Secretary of the Interior concerns drilling and production operation practices and conservation. *See*, Hearings Before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess., on S.Bill 1901 (1953), p. 689; Senate Report 411, 83rd Cong., 1st Sess., p. 11. The Coast Guard, on the other hand, is given the broad authority to regulate safety practices which, in places other than fixed platforms, is given by the Longshoremen's and Harbor Workers' Compensation Act to the Secretary of Labor. 33 U.S.C. § 941a. Pure Oil Company v. Snipes, 293 F.2d 60, 67-68, n. 12 (5th

Cir. 1961). This conclusion is buttressed by the fact that the platform safety regulations specifically exclude "operating equipment used and employed, nor to the methods and operations used, in the drilling for and the production of oil, gas, petroleum, or other subsoil minerals, nor to the transportation thereof by pipeline." 33 C.F.R. § 140.05-5 (c). The Court finds that the operation of an independent housing module on a platform is not a production or drilling operation regulated by the Secretary of the Interior but is rather a matter of general platform safety properly supervised by the Coast Guard. For example, the Coast Guard regulations provide for the number of fire extinguishers to be placed in all galleys, sleeping accommodations, etc. 33 C.F.R. Table 145.10(a). Armstrong v. Chambers & Kennedy, 340 F.Supp. 1220 (S.D.Tex. 1972), on which plaintiff relies, concerned implied liability for violations of the Secretary of the Interior's Regulations but in that case the violations in question resulted from oil drilling and storage operations, and they were properly within the reach of the Secretary's regulatory authority.

In passing, it should be noted that no violations of any Coast Guard regulations have been alleged, and the Court, after reading those regulations, has found none which might apply to the facts as proven in this case.

6. Under Louisiana law, while a plaintiff's burden of making out his case by a fair preponderance of the evidence may be met through the use of circumstantial evidence, such evidence must be of a nature to exclude with a reasonable amount of certainty all other reasonable hypotheses. Hargis v. Travelers Indem. Co., 248 So.2d 833 (La. App. 1971). As indicated earlier in the Findings of Fact, plaintiffs' in this

case have not met that burden with respect to E.L. Wiegand Company, Therm-O-Disc, Inc., or Texsteam Corporation.

7. Louisiana law is not settled on the issue of whether its tort law permits a Workmen's Compensation carrier to be sued for negligent inspection. One Louisiana appeals court has stated that "A cause of action can lie against an insurer for failure to inspect," citing a Fifth Circuit case which noted that such a cause of action did exist when not prohibited by Workmen's Compensation Statutes. Rogers v. Highlands Ins. Co., 270 So.2d 277 (La.App. 1972), citing Keller v. Dravo Corp., 441 F.2d 1239, 1243 (5th Cir. 1971); *see also*, Hill v. U.S.F. & G. Co., 428 F.2d 112 (5th Cir. 1970). Later, another Louisiana appeals court first held that such liability did indeed exist under general tort principles as expressed in the Restatements of Torts, but on rehearing, reversed itself over the dissent of one of the three judges. Kennard v. Liberty Mutual Ins. Co., 277 So.2d 170, on rehearing 277 So.2d 174 (1973). It is the opinion of this Court that the Louisiana Supreme Court would take the better of these two views, that general tort principles do allow an action for negligent inspection by a compensation carrier when not prohibited by the compensation statute involved and when the proper requirements are met.

8. The Court finds nothing in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 941, *et seq.*, which would preclude an action against an insurer for negligent inspection or which indicates that the insurance company stands in the shoes of the employer and is, therefore, immune from suit by an injured employee. On the contrary, the definition of "employer" is used in its normal sense in the Act, 49 F.Supp. 605 (D.C.Md. 1943), aff'd 141 F.2d 324

(4th Cir. 1944). The Act is to be liberally construed, Pillsbury v. United Eng. Co., 342 U.S. 197, 200 (1951), in favor of the injured employee. Voris v. Eikel, 346 U.S. 328 (1953); Nolco Chem. Corp. v. Shea, 419 F.2d 572 (5th Cir. 1969). *See also*, Watson v. Gulf Stevedore Corp., 400 F.2d 649, reh. den. 404 F.2d 1059 (5th Cir. 1968), cert. den. 394 U.S. 976 (1969); Reed v. S.S. Yaka, 373 U.S. 410, reh. den. 375 U.S.410, reh. den. 375 U.S. 872 (1963); Potomac Elec. Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965); Int. Terminal Operator Co. v. Miller, 208 N.Y.S. 2d 813, 28 Misc. 2d 445 (1960).

There are many cases on each side of the compensation carrier liability question. *See, e.g.*, the cases listed in Keller v. Dravo Corporation, 441 F.2d 1239, 1243, notes 3 & 4 (5th Cir. 1971). It suffices to say that this Court believes that neither the language of the compensation act in this case nor public policy justifies immunizing insurers against liability for their own negligence. *See*, Larson, Workmen's Compensation Insurer as Suable Third Party, 1969 Duke L.J. 1117.

9. According to the general principles of tort law applicable to this case, an insurer is liable for a negligent inspection if 1) it has undertaken to perform the inspection or inspections in question, and 2) the evidence discloses an actual reliance by the employer on those inspections to the extent that the employer neglects his own safety inspection program to the detriment of the plaintiff-employees. Stacy v. Aetna Cas. & Sur. Co., 484 F.2d 289 (5th Cir. 1973). As indicated earlier in the Findings of Fact, Pacific Employers Insurance Company (INA), undertook the duty of inspecting to see if its earlier safety recommendations had been follow-

ed, and Movable relied on these inspections to the extent of neglecting its own inspection followup program. The evidence further indicates that Inspector Gilbert Stansbury negligently performed his assumed duty to make a followup inspection and that his negligence was a proximate cause of the injuries and deaths which are the subject of this lawsuit.

10. Argonaut Insurance Company's independent suit against the defendants to recover compensation payments made to parties other than plaintiffs in this case must be dismissed since those payments were not made pursuant to a formal award. Joyner v. F. & B. Enterprises, Inc., 448 F.2d 1185 (D.C. Cir. 1971). Of course, this dismissal does not disturb Argonaut's interventions in plaintiffs' actions.

Accordingly, the parties are instructed to submit proposed judgments consistent with these findings and conclusions.

s/ Frederick J.R. Heebe

W.K. Christovich
William P. Rutledge
Wood Brown, III
Mack Miller
Frank Allen,Jr.
George B. Matthews
Donald Hoffman
Francis G. Weller
James E. Diaz
Alfred S. Landry
W. Eugene Davis
M.N. Grossel-Rossi
James Drury

Charles M. Steen
Joel Borrello
Kelly McKain

APPENDIX "B"

Minute Entry
July 15, 1975
Heebe,J.

Filed: Jul 15, 1975

MARY OLSEN, et al.	CIVIL ACTION
versus	NO. 70-1240
SHELL OIL CO., et al.	SECTION B
CHRISTINE W. CARVER, et al.	CIVIL ACTION
versus	NO. 70-2986
SHELL OIL CO., et al.	SECTION B
FRANK WINSTON BOOKER, et al.	CIVIL ACTION
versus	NO. 71-894
SHELL OIL CO., et al.	SECTION B
GORDON DAVIS WALLACE	CIVIL ACTION
versus	NO. 71-1144
SHELL OIL CO., et al.	SECTION B
ARGONAUT INSURANCE CO.	CIVIL ACTION
versus	NO. 71-1265
SHELL OIL CO., et al.	SECTION B
	(CONSOLIDATED CASES)

This matter is before the Court on motions to amend the Court's Judgment of July 9, 1974, or alternatively, for a new trial filed by Argonaut Insurance Company (Argonaut), plaintiff in Civil Action No. 71-1265, the plaintiffs in the re-

maining consolidated cases, and defendants Shell Oil Company (Shell) and Pacific Employers Insurance Company, an affiliate of the Insurance Company of North America (INA). The question of liability was hotly contested at trial, and the motions for a new trial likewise have been strenuously argued by all parties. The Court was requested to reserve rulings on the motions until a transcript of the testimony could be obtained.

The Court has now had the benefit of a review of that transcript, as well as the extensive memoranda filed by all parties. The questions raised at trial and in the post-trial briefs are serious ones, and the Court has taken this opportunity to make a thorough and fresh reconsideration of the entire case. Upon much reflection, the Court is now convinced that the findings of fact and conclusions of law in the Court's minute entry of June 6, 1974, should be amended to reflect the following results: (1) INA is not liable to the plaintiffs for any damages arising out of the explosion of the hot water heater aboard Movible Rig No. 4 on May 6, 1970; (2) Movible Offshore, Inc. (Movible) was negligent in failing to obtain the temperature pressure relief valve recommended by INA and that negligence was a proximate cause of the plaintiffs' injuries; and (3) Shell is entitled to indemnity from Movible under the written indemnity contract between these two parties for reasonable costs of defense and attorneys' fees.

The Court's findings of fact are set out in its minute entry of June 6, 1974, and there is no reason to repeat what was stated at length there. Instead, the Court will focus only on those facts pertinent to the motions before the Court and on the legal conclusions arising therefrom.

There is no doubt from the evidence introduced at trial, particularly the deposition testimony, that INA had undertaken to inspect Movible's rigs on a periodic basis and to transmit its recommendations to Movible regarding correction of any unsafe equipment or practices which it found. Although the Louisiana law is not settled on the issue of whether its tort law permits a Workmen's Compensation carrier to be sued for negligent inspection, *compare* Rogers v. Highlands Ins. Co., 270 So.2d 277 (La.Ct. App. 1972) *with* Kennard v. Liberty Mutual Ins. Co., 277 So.2d 174 (La.Ct. App. 1973) (on rehearing), we remain convinced that the better view, and the one which the Louisiana Supreme Court would adopt, is that a cause of action for negligent inspection by a compensation carrier does lie when not prohibited by the compensation statute involved. Further, as the Court noted in its earlier opinion, nothing in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 941, *et seq.*, either in its express terms or by implication, indicates an intent to immunize the employer's compensation carrier from a claim of negligent inspection.

Thus, had INA neglected to discover possible safety hazards existing on Movible's Rig No. 4, which in the exercise of due diligence it should have discovered, it would be held negligent and would be liable for any damages proximately caused by that negligence. This is not the case, however. Gilbert Stansbury, INA's safety inspector for the Movible account, discovered that the valve then in place on the hot water heater in question was improper and recommended that Movible install a temperature pressure safety valve. All the experts testifying in this case have agreed that this is the proper type of valve for the particular hot water heater in question. However, through its own misunderstanding, Movible ordered and installed upon the hot water heater a

pressure relief valve only - an inferior, if not totally inappropriate, valve for hot water heaters.

Stansbury returned to Rig No. 4 on October 7, 1969, some eight and a half months after his initial inspection, to check whether Movible had complied with his earlier safety recommendations. The Court found that Stansbury made no visual inspection of the heater upon his return but relied instead on the verbal assurance of Movible's toolpusher that Stansbury's recommendation had been followed.

Thus, the only claim of negligence possible from these facts is that INA breached a duty owed by it to Movible to physically reinspect each area in which a safety recommendation had been made to ascertain firsthand whether those recommendations were complied with. Upon careful reconsideration of this question, we conclude that no such duty was owed by INA to Movible and that Stansbury acted reasonably in accepting the asurance of Movible's toolpusher that the recommended valve was in place upon the heater. Such a duty of reinspection would be beyond any duty presently imposed by the case law. Even those cases which allow a cause of action for negligent inspection speak only of the initial duty of the insurer to inspect the premises and discover hazardous conditions. *See, e.g.*, Stacy v. Aetna Casualty & Surety Co., 484 F.2d 289 (5th Cir. 1973); Keller v. Dravo Corp., 441 F.2d 1239 (5th Cir. 1971); Rogers v. Highlands Ins. Co., *supra*.

There is, as the Court has earlier noted, evidence in the record that INA had undertaken on-site compliance inspections of Movible's rigs and that Movible had asked for and relied on this service provided by INA. But there is no evi-

dence at all to indicate that INA was obligated to disregard assurances by Movible's own employees that INA's recommendations had been adopted. To the contrary, Movible had an extensive safety program of its own, and INA was informed by Movible that each toolpusher had specific expertise in safety conditions existing on the rigs. Stansbury had no reason to disbelieve the statements made by Movible's toolpusher regarding the hot water heater valve.

We emphasize that at the time of Stansbury's return on October 7, 1969, he was reviewing the safety practices on three to five rigs per day at the request of Movible. The short time required to perform these tasks is an additional reason why Stansbury's acceptance of Movible's on-site assurances was reasonable. The evidence preponderates that INA was under no duty to visually inspect Movible's rigs for compliance with its prior safety recommendations after being assured by a knowledgeable Movible employee that those recommendations had been followed. In short, we think that Stansbury acted reasonably under the circumstances and is not chargeable with negligence.

We have again carefully considered the claim urged by INA[1] in its motion for a new trial that Shell, as platform owner, is strictly liable for violation of the Secretary of the Interior's regulations found at 30 C.F.R. §§250.45, 250.46. This claim is based primarily on broad language contained in Armstrong v. Chambers & Kennedy, 340 F.Supp. 1220 (S.D. Tex. 1972), *aff'd in relevant part sub nom.* In re Dearborn Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974). The Fifth Circuit's opinion affirming the portion of the district court's judgment relevant here was issued subsequent

to our decision in the instance case. The regulations read as follow:

> "§ 250.45 Accidents, fires, and malfunctions.
>
> "In the conduct of all its operations, the lessee shall take all steps necessary to prevent accidents and fires, and the lessee shall immediately notify the supervisor of all serious accidents and all fires on the lease, and shall submit in writing a full report thereon within 10 days. The lessee shall notify the supervisor within 24 hours of any other unusual condition, problem, or malfunction.
>
> "§ 250.46 Workmanlike operations.
>
> "The lessee shall perform all operations in a safe and workmanlike manner and shall maintain equipment for the protection of the lease and its improvements, for the health and safety of all persons, and for the preservation and conservation of the property and the environment. The lessee shall take all necessary precautions to prevent and shall immediately remove any hazardous oil and gas accumulations or other health, safety or fire hazards."

The issue is whether these regulations impose strict liability upon an oil or gas lessee for failure to maintain safe equipment, even if only tangentially related to the improvement of its lease, or whether they encompass only such hazards which may fairly be said to be related to oil drilling and production operations. The question is not entirely free from doubt. The terms of the regulation, to be sure, provide that the

lessee shall maintain equipment, *inter alia*, "for the health and safety of all persons." Further, we recognize that there is language in the district court's opinion in *Armstrong* which would support the broader reading of the regulations in question. However, we remain convinced, for the reasons stated in the Court's minute entry of June 6, 1974, that the regulations are inapplicable to the circumstances of this case.

We add here only a few additional comments in support of that decision. The two regulations at issue are part of a series of regulations (found at 30 C.F.R. §§250.1 - 250.100) promulgated by the Secretary of the Interior, pursuant to 43 U.S.C. § 1334 (a)(1).[2] The Secretary is authorized by that statute to prescribe "such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein. . . ." Nothing in this authorizing statute explicitly gives the Secretary the authority to promulgate regulations relating to safety. Certain safety regulations relating directly to the maintenance and operation of the lease may be justified as "correlative" to the primary purpose underlying the legislation. If, however, the regulations are construed broadly to require the lessee, under pain of criminal penalties, *see* 43 U.S.C. § 1334(a)(2),[3] to maintain safe equipment, no matter how tenuously related to its drilling operations, that would raise a serious question whether the Secretary, in promulgating those regulations, had exceeded the authority granted to him under the enabling statute. We need not reach that question, however, because we feel that the regulations in question, particularly 30 C.F.R. §250.46, should be more narrowly construed.

It is a familiar canon of statutory construction that a body

of statutes, or regulations, must be construed *in pari materia*. So read, statutes often take on a narrower scope than their broad terms would otherwise indicate. *See, e.g.*, Reid v. Immigration and Naturalization Service, 95 S.Ct. 1164 (1975).

The body of regulations, found at 30 C.F.R. §§ 250.1 - 250.100, promulgated pursuant to 43 U.S.C. § 1334(a)(1), relates exclusively to the conduct of the drilling and production of oil and gas. Even the regulation most heavily relied on by the parties, 30 C.F.R. § 250.46, is not exclusively designed as a safety measure. Rather, its purpose is to provide for "the protection of the lease and its improvements" and the "preservation and conservation of the property and the environment" as well as health and safety of individuals. Considering the limited authority given to the Secretary to promulgate regulations, the nature of the requlations as a whole, and the clear dichotomy between the jurisdictions of the Secretary of the Interior over drilling operations and the Coast Guard over matters of platform safety (discussed in the Court's earlier minute entry), we remain convinced that the Secretary's regulations are inapplicable to matters relating to the safety of hot water heaters involved in this case.

This conclusion is buttressed, we think, by the opinion of the district court in Armstrong v. Chambers & Kennedy, 340 F.Supp. 1220 (S.D. Tex. 1972), *aff'd in relevant part sub nom.* In re Dearborn Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974). While holding the platform owner civilly liable for violation of the Secretary's regulation, the lower court noted particularly, 340 F.Supp. at 1235, that the failure to remove leaked oil from the platform was in direct violation of 30 C.F.R. § 250.46, requiring the lessee to "re-

move any hazardous oil and gas accumulations." This portion of the regulation is not at issue here, and thus does not control the present case. Further, in discussing the source of the duty imposed upon the lessee, the court noted that the "exploration and development of offshore oil resources * * * presents new and more dangerous challenges in its development" and analogized the duty placed upon the oil lessee to the traditional tort duty of one using an ultrahazardous substance. *Id.*, at 1234. Thus, the underpinning for the court's imposition of strict liability on the platform owner is the peculiar dangers incident to oil exploration. Whatever the dangers presented by hot water heaters, they are not peculiar to oil exploration, and the rationale of the *Armstrong* court would not apply.

While Shell is thus not liable to plaintiffs for damages arising out of the explosion, it is entitled to indemnity from Movible for the costs of its defense in this case, including reasonable attorneys' fees. It is clear that an agreement to indemnify and hold harmless, if applicable to the facts of the case, includes payment of costs and reasonable attorneys' fees incurred by the indemnitee. Loffland Bros. Co. v. Roberts, 386 F.2d 540 (5th Cir. 1967).

There is no doubt that the indemnity agreement involved in this case[4] obligated Movible to indemnify Shell for damages imposed upon it which resulted solely from the negligent acts of Movible. See this Court's minute entry of May 14, 1973. Movible's sole opposition to Shell's claim for attorneys' fees is that this Court's minute entry of June 6, 1974, did not explicitly hold Movible to be negligent.

What is clearly implicit in the Court's earlier opinion, we make explicit now. The fact that the temperature pressure

relief valve, recommended by INA's safety inspector, was not placed on the hot water heater, was due solely to the negligence of Movible's employees. "Desormeaux told Brashear [both Movible employees] the pressure setting he wanted for the valve and its size but did not give Brashear any temperature requirement for the valve. Most importantly, Desormeaux neglected to inform Brashear that the valves he requested were to be placed on hot water heaters." Opinion of June 6, 1974, at 7. Movible makes no claim that it disagreed with INA's recommendations and reasonably felt that a pressure relief valve was sufficient for the task. Instead, through its own carelessness, it simply failed to obtain the very type of valve which it intended to purchase.

Further, the fact that an improper valve was in use on the heater was a proximate cause of the explosion. All the experts agreed that the pressure valve which Movible mistakenly placed on the hot water heater was not specifically designed for that use. While the exact cause of the explosion could not be conclusively determined, there is no doubt that had the temperature pressure relief valve been in place, the accident would have been prevented. The recommended type of valve is designed to relieve excess pressure and temperature, both of which contributed to the explosion of the hot water heater. Since the explosion was proximately caused by Movible's negligence, Shell is entitled to indemnification from Movible for reasonable attorneys' fees and costs.

Finally, Argonaut Insurance Company seeks a reconsideration of the Court's decision that it may not recover compensation payments made to parties other than plaintiffs which were not made pursuant to a formal award. Subsequent to this Court's decision, the United States Court of Appeals for

the Fifth Circuit held that entry of a formal award is not a condition of the carrier's right to maintain suit. Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975).[5] That decision, of course, would govern the disposition of Argonaut's independent suit. However, in light of our present disposition of these consolidated cases, there is no defendant from whom Argonaut can recover its compensation payments, and its suit must, on that ground, be dismissed.

We have carefully considered all the other claims made by the parties in their motions for a new trial. They are all disposed of by previous decisions by the Court, and we find no reason to depart from those determinations. Accordingly,

IT IS ORDERED that the motion of Pacific Employers Insurance Company, defendant in these consolidated cases, for rehearing to amend judgment or, alternatively, for a new trial, be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the motion of Shell Oil Company, defendant in these consolidated cases, to amend judgment, be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the motion of plaintiffs in Civil Actions Nos. 72-1240, 70-2986, 71-894, and 71-1144 for additional findings, be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that the motion of Argonaut Insurance Company, plaintiff in Civil Action No. 71-1265, for modification of judgment and, alternatively, for a new trial, be, and the same is hereby, DENIED.

The parties are instructed to submit proposed amended judgments consistent with the findings of fact and conclusions of law contained herein.

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1. We note that this contention was not made in the post-trial memorandum filed by the plainintiffs in these consolidated cases.

2. 43 U.S.C. §1334(a)(1):

"The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of oerations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production."

3. Further, under Armstrong v. Chambers & Kennedy, *supra*, the lessee is liable as well for civil damages on a theory of strict liability.

4. The indemnity agreement between Shell and Movible reads as follows:

"In the performance of the operations hereunder, contractor is an independent contractor, Shell being interested only in the results obtained. Contractor agrees to protect, indemnify and save Shell, and where the operations are rendered in a joint operation, such other parties in the joint operation with Shell, harmless from and against all claims, demands and causes of action of every kind and character, arising in favor of third parties on account of personal injuries and/or deaths or damages to property occurring, in anywise incident to, in connection

with, or arising out of, contractor's negligence in performing the operations under this contract."

5. The case decided by the Fifth Circuit, although arising in a more complicated procedural context between different parties, involved the very suit by Argonaut which is at issue here.

s/ Frederick J.R. Heebe

APPENDIX C

Mary OLSEN, Plaintiff-Appellant
Cross Appellee,
v.
SHELL OIL COMPANY et al., Defendants-
Appellees Cross Appellants,
v.
ARGONAUT INSURANCE COMPANY,
Intervenor-Appellant.
Christine W. CARVIN, Plaintiff-Appellant
Cross Appellee,
v.
SHELL OIL COMPANY et al., Defendants-
Third Party Plaintiffs Appellees-Cross Appellants,
v.
TELEDYNE MOVIBLE OFFSHORE, INC., et al.,
Third Party Defendants-Appellees Cross Appellants,
v.
ARGONAUT INSURANCE COMPANY,
Intervenor-Appellant.
Frank Winston BOOKER et al.,
Plaintiffs-Appellees,
v.
SHELL OIL COMPANY et al.,
Defendants-Appellants.
Gordon Davis WALLACE, Plaintiff-Appellant
Cross Appellee,
v.
SHELL OIL COMPANY et al., Defendants-
Appellees Cross Appellants,
v.
ARGONAUT INSURANCE COMPANY,
Intervenor-Appellant.

ARGONAUT INSURANCE COMPANY,
Plaintiff-Appellant Cross Appellee,
v.
SHELL OIL COMPANY et al., Defendants-Appellees Cross Appellants.
No. 75-4019.
United States Court of Appeals
Fifth Circuit.
Oct. 26, 1977.
Rehearing and Rehearing En Banc Denied Dec. 1, 1977.

Injured employee and representatives of deceased employees of drilling contractor sued owner of drilling platform and others for injuries and death caused by explosion of water heater in drilling contractor's modular living quarters which had been installed on the platform. The United States District Court for the Eastern District of Louisiana, at New Orleans, Frederick J. R. Heebe, J., entered judgment in favor of platform owner, and appeal was taken. The Court of Appeals, Fay, Circuit Judge, held that: (1) the Outer Continental Shelf Lands Act did not create a private cause of action in favor of plaintiffs against platform owner for breach of regulation of the Secretary of Interior where there was no negligence on the part of the platform owner, but (2) certain questions as to Louisiana law under Louisiana statute providing that owner of building is answerable for damage occasioned by its ruin when this is caused by neglect to repair it or as result of a vice in its original construction would be certified to the Louisiana Supreme Court.

Ordered accordingly.

1. Mines and Minerals 118

Outer Continental Shelf Lands Act did not create private cause of action against owner of drilling platform for breach of regulation of the Secretary of the Interior in connection with explosion of electric heater in drilling contractor's housing module, in favor of employees or representatives of employees of the contractor injured or killed in the explosion, since: (1) protection of workers on such platforms was not a motivating force behind the legislation, (2) other civil remedies were provided by the legislative scheme, (3) such remedies were not adequate and it was not necessarily consistent with the legislative goal of the Act to impose liability on platform owner which had leased shelf land when such lessee was admittedly free from fault, and (4) it appeared that the controversy should be controlled by state law. Outer Continental Shelf Lands Act, §§ 2-15, 4, 4(a)(2), (c), 5, 5(a)(2), 43 U.S.C.A. §§ 1331-1343, 1333, 1333(a)(2), (c), 1334, 1334(a)(2).

2. Negligence 44

Within Louisiana statute providing that owner of building is answerable for damage occasioned by its ruin when this is caused by neglect to repair it, "neglect to repair" means failure to keep in repair and does not require a showing of negligence. LSA—C.C. art. 2322.

See publication Words and Phrases for other judicial constructions and definitions.

Wm. P. Rutledge, Lafayette, La., for Olsen, et al.

Joel L. Borrello, New Orleans, La. for Argonaut Ins. Co.

Donald A. Hoffman, New Orleans, La., for Pacific Employers Ins. Co.

John O. Charrier, Jr., New Orleans, La., for Shell Oil Co.

W. K. Chirstovich, Charles W. Schmidt, III, New Orleans, La., for Teledyne Movible.

Francis G. Weller, New Orleans, La., for Wiegand Co. & Thermo-Disc, Inc., other interested parties.

Patrick T. Caffery, New Iberia, La., for Texsteam Corp.

W. Eugene Davis, New Iberia, La., for plaintiff-appellant cross appellee.

Before GOLDBERG and FAY, Circuit Judges, and DUMBAULD, District Judge.*

* District Judge for the Western District of Pennsylvania, sitting by designation.

FAY, Circuit Judge:

The controversy before this court is factually complex and presents some novel questions of law. It pertains to the explosion of electric water heater in the living quarters on a drilling platform on the Outer Continental Shelf. The question is whether there is liability of the platform owner, Shell Oil Company, to some of those people who were either injured or killed as a result of the explosion. The plaintiffs set forth two theories of liability. First, they contend that Shell is answerable for the injuries which have occurred because it violated certain regulations issued by the Secretary of the Interior pursuant to the authority granted to him by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334 — the violation of which was a direct cause of the plaintiffs' injuries. In the alternative, the plaintiffs contend that the Louisiana Civil Code Art. 2322[1] imposes a form of strict liability on certain owners of buildings,[2] and, as a result, Shell is liable to the plaintiffs regardless of its lack of personal negligence. We hold that Shell is not liable for breach of the federal regulations because the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., does not provide specifically for a civil remedy for violations of the statute or regulations, and because we feel that this is not the type of situation in which a cause of action should be implied or created. *See Cort v. Ash*, 422 U.S.

[1] Louisiana Civil Code Art. 2322 provides:

The owner of a building is answerable for the damage occassioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction.

[2] The Louisiana courts have extended the definition of "buildings" to include oil platforms. *See Vinton Petroleum Co. v. L. Seiss Oil Syndicate, Inc.*, 19 La.App. 179, 139 So. 543 (1st Cir. 1932).

66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). We also conclude that it is impossible for us at the present time to rule on the theory of liability based upon Louisiana Civil Code Art. 2322. After an exhaustive study of Louisiana law, we feel that there is no clear controlling precedent from the highest court in that state, and, consequently, we are compelled to certify the issue to the Lousiana Supreme Court.

I. FACTS

On May 6, 1970, a hot water heater explosion occurred aboard a fixed platform owned by Shell Oil Company in the Gulf of Mexico off the coast of Louisiana. The platform was designated as Shell's "C" platform, and drilling was being conducted from the platform by a drilling contractor known as Movible Offshore, Inc. (Movible). The individual plaintiffs in this case are the legal representatives of men killed in the explosion, except for Gordon Wallace who sues for personal injury. The plaintiffs were all employees of Movible.

To conduct the drilling operations from the platform, Movible had located its modular and movable drilling rig on the platform. The rig consisted of all equipment necessary to drill a well, including a derrick or mast, drawworks, the very large engines which were necessary to power the drilling equipment, and all normal appurtenances to a drilling operation. In addition, Movible had its modular living quarters on the Shell platform which provided a galley area for feeding the men, sleeping quarters, shower and bathroom facilities, and a lounge area. The living quarters unit was equipped with two electric water heaters. One water heater was located in the galley area, and another was located in the pantry area. These water heaters were Movible equipment and were wholly owned, as was the living quarters unit, by

Movable. The modular living unit was fully movable, and when the rig was moved from one platform to another, it was picked up as a unit by a derrick barge and then transported to a new site and secured on a platform in such a way that cutting and burning of metal would be required to remove it.

Under the working arrangement in effect between Shell and Movible, two Movible drilling crews consisting of six men each worked opposite shifts so that the drilling rig could be kept in operation 24 hours a day. Shell performed none of the actual operations on the rig and had only one permanent representative there.

At the time Movible began drilling for Shell from Platform C or shortly thereafter, Movible took out liability insurance with Pacific Employers Insurance Company (Pacific), an affiliate of the Insurance Company of North America. In addition to providing liability insurance to Movible, Pacific agreed to provide a safety engineering and safety inspection service to Movible. This service was provided largely through one Gilbert Stansbury, a safety and technical representative of Pacific.

In connection with the safety engineering and technical service provided by Pacific, Mr. Stansbury was to visit the Movible rig on a quarterly basis. Mr. Stansbury first visited the rig on January 23, 1969, and then he did not revisit the rig until October 7, 1969. On his first visit, Stansbury inspected the water heaters in the company of Movible's toolpusher, a Mr. Desormeaux. At this time, he recommended (among other things) that a pressure-temperature relief valve be placed on the water heaters in question in place of the ex-

isting pressure relief valves. Movible failed to accurately follow the recommendation of Mr. Stansbury, although they should have understood the recommendation since prior insurers had made the same or similar suggestions and Stansbury himself had made the same recommendation during inspections of other Movible rigs. Instead of ordering the proper type of "pressure-temperature" relief valve, Movible ordered and installed another pressure relief valve.

The valves were replaced on February 3, 1969. Mr. Desormeaux inspected the heaters after the installation of the valves and concluded that "everything looked okay." On October 7, 1969, Stansbury returned to the rig and interviewed another Movible toolpusher who had since replaced Mr. Desormeaux. Mr. Stansbury did not make a visual inspection of the water heater but relied on the toolpusher's assurances that his recommendations had been followed. As a result, Stansbury reported that all his recommendations had been fulfilled.

On May 6, 1970, the hot water heater located in the pantry of the living quarters exploded resulting in many deaths and injuries. The trial judge found that the bottom of the hot water heater ruptured as a result of great pressure which built up in the tank. Then, the great explosive force was created when the water in the heater, which was "superheated" to a temperature of above its boiling point of 212° F., instantly "flashed" into steam when freed from the pressured confines of the tank and just as instantly expanded to more than 1,000 times its liquid volume.

The trial judge further found that the fact that an improper valve was in use on the heater was a proximate cause of the explosion. All the experts agreed that the pressure valve which Movible mistakenly placed on the hot water heater was not specifically designed for that use. While the exact cause of the explosion could not be conclusively determined, there is no doubt that had a working temperature pressure relief valve been in place, the accident would have been prevented. The recommended type of valve is designed to relieve excess pressure and temperature, both of which contributed to the explosion of the hot water heater.

On June 6, 1974, the trial judge entered his opinion with respect to liability in the case. He found that there was no negligence (as all parties admit) on the part of Shell Oil Company; he held that Louisiana Civil Code Act 2322 was inapplicable, and he held that certain regulations of the Department of Interior did not create strict liability as against Shell in the plaintiff's favor in this case. In the same opinion Judge Heebe also held that Pacific Employers Insurance Company was negligent through one of its inspectors (Mr. Stansbury) who faild to reinspect Movible's premises after recommending that the relief valve be changed on the water heater which exploded. The trial judge also found that the Texstream Corporation, the manufacturer of the valve, was not liable. Judgment was entered accordingly.

Thereafter, on motion to reconsider his judgment, the trial judge issued another opinion in which he concluded that the inspector for Pacific Employers Insurance Company was not negligent, but that his earlier opinion in all other respects was correct. The court made explicit in

this opinion that the cause of the water heater explosion was the negligence of Movible. The net result of this decision, however, is that the plaintiffs recovered nothing. Movible, who was originally a party to the action, had earlier been granted a summary judgment on the basis that the Longshoremen and Harbor Workers Compensation Act made it immune from suit as the employer of the dead and injured men. Movible is presently in the litigation only as a third party defendant to the claim of Shell Oil Company for indemnity. From this final judgment of the district court, the plaintiffs appealed solely against Shell and solely on the basis that Shell is strictly liable to them. Shell then lodged protective appeals against all of the co-defendants and Movible for indemnity purposes. Movible did likewise.

II. BREACH OF THE FEDERAL REGULATION

A. *The Plaintiffs' Theory and Shell's Rebuttal.*

The plaintiffs' theory of recovery is rather simple. They argue that the Outer Continental Shelf Lands Act empowers the Secretary of the Interior to make regulations for operation upon platforms such as Shell's. Specifically, 43 U.S.C. § 1334(a)(1) provides:

> The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provi-

sions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter.

The plaintiffs assert that pursuant to this statutory authority the Secretary of the Interior issued the following regulations which are applicable in our controversy:

1) 30 C.F.R. § 250.30 Lease Terms, Regulations, Waste, Damage and Safety." The lessee shall comply with the terms of applicable laws and regulations, the lease terms, OCS Orders and other written orders and rules of the supervisor, and with oral orders of the supervisor . . . The lessee shall take all necessary precautions to prevent damage to or waste of any natural resource or injury to life, or property, or the aquatic life of the seas.

2) 30 C.F.R. § 250.45 Accidents, Fires, and Malfunctions.

In the conduct of all its operations, the lessee shall take all steps necessary to prevent accidents and fires.

3) 30 C.F.R. § 250.46 Workmanlike Operations.

The lessee shall perform all operations in a safe and workmanlike manner and shall maintain equipment for the protection of the lease and its improvements, for the health and safety of all persons, and for the preservation and conservation of the property and the environment.

It is argued by the plaintiffs that the above regulations are presumptively valid and that they are applicable to our factual situation. They further argue that Shell [as a lessee of submerged land on the Outer Continental Shelf] breached these regulations, and that this breach visits liability upon Shell regardless of whether or not Shell was in fact negligent. In support of this theory of liability, the plaintiffs cite to us *Armstrong v. Chambers & Kennedy*, 340 F.Supp. 1220 (S.D.Tex. 1972), *aff'd on other grounds sub nom. In Re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1974). In *Chambers & Kennedy*, the trial court approved a similar theory of strict liability for breach of these regulations. The court stated:

This court must interpret the congressional intent and the Secretary's reasons for promulgating the regulations as imposing certain nondelegable duties upon C & K, as the lessee and owners of the platform. The public policy indicated by these legislative and administrative acts are imperative to the common good and protection of our national community. Thus, *any* violation, even a nonfeasance, of the guidelines set as preventive measures to accidents must expose the lessee to ultimate liability in tort.

Id. at 1233, 1234.

Shell counters this argument by asserting that the Secretary's regulations are invalid. It contends that the enabling statute give both the Secretary of the Interior and the head of the department in which the Coast

Guard is operating authority to issue regulations,[9] and it was the Coast Guard exclusively that was given the authority to issue safety regulations. Shell specifically contends that:

> . . .the regulations upon which Judge Singleton relied in *Armstrong v. Chambers & Kennedy*, 340 F.Supp. 1220 (S.D.Tex., 1972), being the same ones relied upon by plaintiffs in this action (30 CFR 250.45—250.46), if construed as safety and health regulations for the protection of life and property on the offshore platforms so as to create strict liability in the lease owner, so extend and so modify the granting statute, 43 U.S.C.A. 1334, as to exceed the authority granted by the enabling legislation.

Brief for appellee at 31. To support this view, Shell delves deeply into the legislative history of the Outer Continental Shelf Lands Act only to emerge without really proving their point. If the legislative history of the statute shows anything, it is merely that nothing was specifically said one way or the other as to whether or not the Secretary of the Interior has the authority to issue safety regulations. It does not necessarily follow, as Shell alleges, that merely because the Coast Guard is given the authority to regulate in the area of safety, other agencies are devoid of this power.

[9] 43 U.S.C. § 1333(e)(1) provides:

> The head of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the islands and structures referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

Shell, however, does not rest its case solely on the delegation of power theory. In the alternative, they adopt the position taken by the trial court. The trial court held that the regulations were validly promulgated, but were inapplicable to this particular factual setting. The court states specifically:

> It is true, as a general proposition, that "a civil remedy may be implied for those clearly within the protective realm of legislation or regulations in the public interest." *Euresti v. Stenner*, 458 F.2d 1115, 1119 (10th Cir. 1972); *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969). *See* Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 Harv.L.Rev. 285 (1963). The workers in this case were not clearly within the protective realm, however, since it appears that the regulations in question were not meant to apply to the housing module in this case. . . . Both the wording of the statutes and regulations, and the legislative history of the statutes, indicate that the authority of the Secretary of the Interior concerns drilling and operation practices and conservation. . . . The Coast Guard, on the other hand, is given the broad authority to regulate safety practices which, in places other than fixed platforms, is given by the Longshoremen's and Harbors Workers' Compensation Act to the Secretary of Labor. . . . The Court finds that the operation of an independent housing module on a platform is not a production or drilling operation regulated by the Secretary of the Interior but is rather a matter of general platform safety properly supervised by the Coast Guard. . . . *Armstrong v. Chambers & Kennedy*, 340 F.Supp. 1220 (S.D.Tex. 1972), on which the plaintiff relies, concerned implied liability for violations of the Secretary of

the Interior's Regulations but in that case the violations in question resulted from oil drilling and storage operations, and they were properly within the reach of the Secretary's regulatory authority.

Minute Entry of Trial Court, June 6, 1974. (App. 729-731).

B. IMPLYING CIVIL REMEDIES

In our opinion, neither party touches on the point which we feel is determinative of the legal effect of the breach of these regulations by Shell Oil Company. That is, even if we assume that the regulations were valid and applicable to our factual setting, what, if any, is the legal effect of their being breached by Shell? The trial court touches on the issue in its above quoted conclusions of law when it stated that civil remedies may be implied in certain situations, but the Court erred in concluding that a civil remedy may be extended to one injured by a breach of a statute or regulation which does not specifically provide for such relief as long as the person injured is clearly within the protective realm of the legislation or regulation. The inquiry which must be made before implying a civil cause of action for a person suffering injury as a result of another's conduct in violation of a regulatory statute which does not expressly provide for a civil remedy is not nearly so simple.

In 1916, the Supreme Court announced the doctrine of implying private actions in the absence of specific statutory authorization in *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33, 36 S.Ct. 482, 60 L.Ed. 874 (1916). Rigsby, a railroad employee, sought damages for injuries resulting from his employer's violation of the Federal Safety Appliance Act. The Court upheld his recovery while recognizing that the Act did not expressly confer a private right of action. In broad language, the Court stated:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . .

Id. at 39, 36 S Ct. at 484.

This rather unique question of whether a court can or should imply an action for an injured party who has no express statutory remedy has sparked a great deal of legal commentary, and a string of Supreme Court opinions whose main virtues are not consistency of results. The justification for implication most often proffered by courts and commentators is that it merely furthers the goals Congress was seeking to attain when it initially enacted the legislation.[4] Congress may accomplish these goals through regulation or prohibition of specified conduct. Generally speaking, however, these regulations or prohibitions are only as effective as the statutory sanctions behind them, and, unfortunately, Congress must often decide on these statutory sanctions without a prior opportunity to evaluate their practical effectiveness. In contrast, courts are charged with the duty of enforcing the statute on a case by case basis, and have the opportunity to observe the effectiveness of the enforcement mechanisms. Fully aware of this hindsight advantage, the Supreme Court has sanctioned, in limited situations, the implication of private civil remedies.

[4] See, e.g., Comment, Private Rights of Action under *Amtrak* and *Ash*: Some Implications for Implication. 123 U.Pa.L.Rev. 1392, 1393 (1975); Comment, Emerging Standards for Implied Actions Under Federal Statutes, 9 U.Mich. J.L.Ref. 294, 296 (1976).

The criteria for courts to apply in deciding whether or not to imply a civil cause of action have gone through numerous changes since the implication doctrine was first recognized in 1916.[4] The Supreme Court's most recent pronouncement on the matter, however, delineates the factors which we must consider in making that decision. In *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court held that a private cause of action for damages against corporate directors should not be implied in favor of a corporate stockholder under 18 U.S.C. § 610 — a criminal statute prohibiting corporations from making "a contribution or expenditure in connection with any election at which Presidential and Vice Presidentail electors . . . are to be voted for." In making that decision, the court stated:

[4] For example, in *Switchmen's Union v. National Meditation Bd.*, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61 (1943), the Supreme Court recognized that if an act created a right there must be some method of enforcing it, but also stated that the specification of one remedy in the act would normally be understood to exclude another. *Id.* at 301, 64 S.Ct. 95. This is the first time the Court applied the rule of statutory construction *expressio unius est exclusio alterius* to deny implication. In *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), the Supreme Court stated a rather liberal rule for vindicating federal rights in an action for damages for violation of constitutional rights. The Court stated that when "federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 684, 66 S.Ct. at 777. This rather liberal attitude was given a set back in the 1950's when, in a series of three cases, the Court refused to imply a remedy. See *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952 (1959); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed.2d 340 (1958); *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951).

In 1964, the Court returned to a more liberal position in *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964) when it held that a private party could bring a derivative action for the use of false and misleading proxy statements, in violation of section 14(a) of the Securities Exchange Act of 1934. In reaching this conclusion, the Court emphasized the broad remedial purposes of the Act, and

Indetermining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *"Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33, 39, [36 S.Ct. 482, 484, 60 L.Ed. 874] (1916) (emphasis supplied) — that is, does the statute create a federal right in favor of the plaintiff? Second, is there

concluded that private enforcement was a necessary supplement to effectuate the congressional purpose. In 1967, in *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), the Court reaffirmed its decision to *Borak* when it held that the criminal sanction of section 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409, was not an exclusive remedy under the statute. The Court articulated a set of three criteria for determining when an implied remedy should be found. First, the expressly provided criminal sanctions must be inadequate to ensure the full effectiveness of the statute. Second, the interest of the plaintiff must be within the protection of the statute. Finally, the injury must be of the type that the statute was intended to forestall. These three criteria, however, were not long-lived as the sole judicial test for implying remedies. In *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974) (Amtrak), there was a return to a more restrictive attitude about implying civil remedies. The Amtrak Act, 45 U.S.C. § 301 *et seq.* (1970), expressly provided that only the Attorney General had the right to institute a civil action except in cases involving labor agreements. The Court held that the express provision of the remedy to the Attorney General precluded the inference of a civil action in favor of the plaintiffs absent any clear indication in the legislative history that a right of action should be inferred. The Court also stated that the legislative history evidenced an intent to preclude civil remedies, and that an implied remedy would conflict with the Act's policy of streamlining the proceses for eliminating unproductive rail routes in order to save the overall passenger system.

The only other case of significance subsequent to *Amtrak* and prior to *Cort* was *Securies Investor Protection Corp. v. Barbour,* 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975). This controversy involved whether a right of action by a private party was impliedly created by the Securities Investor Protection Act of 1970 (SIPA), 15 U.S.C. § 78aaa *et seq.* The Court's opinion followed the reasoning of *Amtrak* and denied implication mainly because there was a lack of extrinsic evidence indicating that Congress intended to imply private remedies.

any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460, [94 S.Ct. 690, 693, 694, 38 L.Ed.2d 646] (1974) (Amtrak). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g., Amtrak, supra; Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423, [95 S.Ct. 1733, 1740, 44 L.Ed.2d 263] (1975); *Calhoon v. Harvey*, 379 U.S. 134, [85 S.Ct. 292, 13

This Court, not unlike the Supreme Court, has had a less than consistent approach to implying civil remedies. The most oft cited case concerning this issue is *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969). In *Gomez*, the employers of migratory workers and certain state officials had allegedly violated the Wagner-Peyser National Employment System Act. The workers alleged they had been paid inadequately and subjected to abominable living conditions. The only sanction set forth in the Act was a cutoff of federal grants to the states for programs under the Act. This Court decided that this remedy was wholly inadequate and held that the workers were entitled to additional relief under the Act. In enacting this legislation, Congress was aware of and concerned with the slave-like living conditions of these workers. Chief Judge Brown's opinion in *Gomez* relied heavily on the fact that the legislative history of the Act, and the regulations promulgated pursuant to it, indicated an intent to confer an interest upon migrant farm workers which would go unfulfilled unless more stringent enforcement standards were implied.

The liberal approach taken in *Gomez* has not always been followed by this court. One example is *Breitwieser v. KMS Industries, Inc., 5 Cir., 467 F.2d 1391 (1972)*, in which it was held that the child labor provisions of the Fair Labor Standards Act, 29 U.S.C. § 212, and the regulations promulgated thereto, did not create a private cause of action for damages for wrongful death. The Court's rationale rested mainly on the point that when a substantial remedy is provided for by statute, an additional remedy should not be implied absent a showing that such relief is necessary to implement Congress' intent in enacting the statute. The mere fact that the state workmen's compensation law provided the plaintiff with a minimal recovery ($750 in this case), "does not justify a federal court's creating a new federal remedy based on a statute that gives no hint of such a remedy in a field . . . that has traditionally been left to the states." *Id.* at 1394.

L.Ed.2d 190] (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin v. Wheeler*, 373 U.S. 647, 652, [83 S.Ct. 1441, 1445, 10 L.Ed.2d 605] (1963); cf. *J. I. Case Co. v. Borak*, 377 U.S. 426, 434, [84 S.Ct. 1555, 1560, 12 L.Ed.2d 423] (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395, [91 S.Ct. 1999, 2003-2004, 29 L.Ed.2d 619] (1971; *id.*, at 400, [91 S.Ct. [1999] at 206] (Harlan, J., concurring in judgment).

Id. at 78, 95 S.Ct. at 2088.

There is no question that the factors enunciated in *Cort* must control the decision-making process in the case before us, but fully understanding and properly applying these factors is no minor task. Our first step in this inquiry must be to examine briefly the Outer Continental Shelf Lands Act since it would be fruitless to attempt to deal with the *Cort* criteria without this background.

In 1953 Congress enacted the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* This Act asserted United States' ownership of and jurisdiction over minerals in and under the Outer Continental Shelf.[6] It

[6] Continental shelves have been defined as those slightly submerged portions of the continents that surround all the continental areas of the earth. They are that part of the continent temporarily (measured in geological time) overlapped by the oceans. The outer boundary of each shelf is marked by a sharp increase in the slope of the sea floor. It is the point where the continental mass drops off steeply toward the ocean depths. Generally, this abrupt drop occurs where the water reaches a depth of 100 fathoms or 600 feet. Along the

also extended the Constitution and laws of the United States to the shelf lands, and established an exclusive system of mineral leasing on the Outer Continental Shelf. Section 1332 of the Act asserts United States jurisdiction over the Shelf while section 1333 provides that federal law is applicable on the shelf, applying state law only as federal law, and only when not inconsistent with applicable federal law. Section 1334 deals with the administration of leases, and it grants the Secretary of the Interior the authority to promulgate regulations in order to comply with the provisions of the Act relating to leasing. Section 1334 also prescribes criminal penalties for any person knowingly and willfully violating the Act. The rest of the Act, §§ 1335-1343, deals almost exclusively with the leasing system to be applied on the Shelf.

[1] Given this brief background, we can now delve deeper into the history and purpose of the Act as we analyze it within the framework of the *Cort* criteria. The first factor we must consider is whether the injured employees on the platform should be considered "one of the class for whose *especial* benefit the statute was enacted." The *Cort* opinion sheds little light on exactly how to handle this factor. On the one hand, there is language to the effect that the factor would be satisfied if the statute created any federal right in favor of the

Atlantic coast, the maximum distance from the shore to the outer edge of the shelf is 250 miles and the average distance is about 70 miles. That part of the shelf which lies within historic state boundaries, or three miles in most cases, is estimated to contain about 27,000 square miles or less than 10% of the total area of the shelf. The primary purpose of the Act is to authorize and control the leasing of the remaining 90% of the shelf.

plaintiffs, or if there was any sort of pervasive legislative scheme governing the relationship between the plaintiffs' class (workers on the platforms) and the defendant's class (a lessee of rights to resources on or under the Shelf). Given this interpretation of the criterion, it would most likely be satisfied in our case. Section 1333 of the Act deals with what law to apply in controversies arising on the shelf, and specifically provides that with respect to disability or death of an employee as the result of operations on the shelf, the Longshoremen's and Harbor Workers' Compensation Act shall apply. From this provision alone, it appears that a federal right has been created in the plaintiffs' class. However, a reading of the entire *Cort* opinion leads one to question whether this is what the Supreme Court meant when it stated that the plaintiff must be in the class for whose especial benefit the statute was enacted. The opinion seems to imply that a cause of action should not be created unless the primary purpose of the Act (or at least one of the primary purposes) is to benefit or protect the workers on offshore oil platforms.[7] If this is the proper interpretation of the Court's language, then this criterion would not be satisfied. A review of the legislative history of the Act outlines specifically the purposes behind the legislation. The House of Representatives Report on the bill stated:

[7] This interpretation is based on two points. First, the Supreme Court made an effort to examine the legislative history of 18 U.S.C. § 610 in order to find the purpose in enacting the legislation, and then concluded that this legislative history "demonstrates that the protection of ordinary stockholders was at best a secondary concern." 422 U.S. 66, 81, 95 S.Ct. 2080, 2089, 45 L.Ed.2d 26 (1975. The second rationale for this interpretation is the actual language used by the Court — "is the plaintiff one of the class for whose *especial* benefit the statute was enacted." Standing alone, this language would appear to mean that unless the primary purpose of the legislation was to benefit the plaintiff, then no remedy should be implied.

The purpose of H.R.5134 is to amend the Submerged Lands Act in order that the area in the outer Continental Shelf beyond boundaries of the States may be leased and developed by the Federal Government. At the present time the Submerged Lands Act merely established that the seabed and subsoil in the outer Continental Shelf beyond State boundaries appertained in the United States and was subject to its jurisdiction and control.

There are no provisions for the leasing and development of the area by the Federal Government nor are provisions made for the exchange of State leases for Federal leases in the same area.

This bill contains provisions to accomplish those very objectives.

H.R.Rep.No.413, 83d Cong., 1st Sess., 2 (1953). The report then proceeded to explain the need behind the legislation:

Representatives of the Federal departments, the States, and the offshore operators all urged the importance and necessity for the enactment of legislation enabling the Federal Government to lease for oil and gas operations the vast areas of the Continental Shelf outside the State boundaries. They are unanimously of the opinion, in which this committee agrees, that no law now exists whereby the Federal Government can lease those submerged lands, the development and operation of which are vital to our national economy and security. It is, therfore, the duty of the Congress to enact promptly a leasing policy for the purpose of encouraging the discovery and development of the oil potential of the Continental Shelf.

The committee is also of the opinion that legislative action is necessary in order to confirm and give validity to Presidential Proclamation 2667 of September 8, 1945, wherein the President, by Executive declaration asserted, in behalf of the United States, jurisdiction, control, and power of disposition over the natural resources of the subsoil and seabed of the Continental Shelf. Many other nations have made assertions to a similar effect with respect to their continental shelves, and the committee believes it proper and necessary that the Congress make such an assertion in behalf of the United States.

Id. at 2, 3. Similar language was used in the Senate Report. In explaining the resons why jurisdiction needed to be asserted over the Shelf, the Report stated:

> [T]he discovery of extremely valuable deposits of oil and gas and probably sulfur in the seabed of the Continental Shelf off the shores of the United States, as well as its vast potential as a source for other raw materials, gave rise to the necessity for protection and control of the area and administration of the development of its economic wealth, so essential to our economy in peace or war.

S.Rep.No.411 of the Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 7 (1953).

There can be no question that the primary purpose for this legislation was to assert United States jurisdiction over the shelf, and to set up a system for the full development of its natural resources. Protection of the workers on the platform, while no doubt a legitimate concern of Congress, was not a motivating force behind the legislation, and, in fact, only became relevant if jurisdiction

was asserted. Therefore, it would not be unfair to say that protection of these workers, like protection of the "ordinary stockholder" in *Cort*, was "at best a secondary concern" of the Act.

There is no language in *Cort* to the effect that all four criteria must be met in order to imply a cause of action. Rather, the Court simply said that several factors were relevant and worthy of consideration. Consequently, it is not necessary for us to decide which of the above interpretations of the "especial benefit" language is correct. We do consider it relevant that protection of these workers was not the motivating force behind the legislation, but we also think that it is important that Congress did feel it necessary to provide certain rights in the Act to these workers.

The fact that Congress did specify certain remedies in the Act might, however, indicate an intent by Congress to deny any other type of civil remedy. This result would follow if we were to employ the doctrine of statutory construction known as *expressio unius exlusio alterius*, and this leads us into the consideration of the second *Cort* factor:

> [I]s there any indication of legislative intent, explicit or implicit, either to create a remedy or to deny one?

422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975).

Prior to the *Cort* opinion, the law appeared to be that if "legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies" absent clear con-

trary evidence of legislative intent. *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974) (Amtrak). The *Cort* opinion seems to modify this position somewhat. The statute under scrutiny in *Cort* provided for ciminal sanctions, yet the Court stated that "provision of a criminal penalty does not necessarily preclude implication of a private cause of action for damages." 422 U.S. 66, 79, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975). The *Cort* opinion also differed from *Amtrak* in that it stated that absence of any intention to create a cause of action in the legislative history would not necessarily preclude implication, although an implicit or explicit purpose to deny such cause of action would be controlling.

The controversy before us is significantly different than the facts before the Supreme Court in *Cort*. The Outer Continental Shelf Lands Act not only provides criminal penalties for violation of the Act (§ 1334(a)(2)), but also provides extensive civil remedies. As previously noted, § 1333(c) provides that the Longshoremen's and Harbor Workers' Compensation Act should apply in cases of disability or death of an employee working on the platform, and § 1333(a)(2) provides the workers on the shelf any remedy which might be available under state law as long as that remedy is not inconsistent with federal law. We feel, therefore, that fewer reasons exist to imply a cause of action in this case than were present in *Cort*. The workers on the platform potentially have extensive civil remedies,[8] and, keeping in mind that the

[8] The potential remedies available to the plaintiffs in our case include their workmen's compensation recovery (which they received) and any meritorious negligence, strict liability, or contract action which could lie against any party other than their immediate employer.

underlying purpose of implication is merely to ffectuate the goals of Congress, we fail to see how implying this additional remedy will significantly further the goals Congress was seeking to accomplish in passing the act. Therefore, a much stronger argument can be made for applying the *expressio unius exclusio alterius* doctrine here than could be made in *Cort*, and this argument is strengthened by language in the legislative history of the Act which indicates that the plight of the workers was considered, and that the remedies provided for by the statute were intended to be the sole solution for this plight. Senator Cordon, while presenting the reasons to the Senate for adopting state law in certain situations, explained that "the full development of the estimated values in the shelf area will require the efforts and the physical presence of thousands of workers on fixed structures in the shelf area. Industrial accidents, accidental death, peace and order" present problems requiring a body of law for their solution. Since "as every member of the Senate knows, the Federal Code was never designed to be a complete body of law in and of itself," the Senate Committee decided that state law would have to be referred to in some instances. 99 Cong.Rec. 6962-6963 (1952), *quoted in Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352, 358, 89 S.Ct. 1835, 1838, 23 L.Ed.2d 360 (1969).

The language of Senator Cordon, and the extensive civil remedies available to the workers, indicates to us a legislative intent to deny a civil remedy for breach of the Secretary of Interior's regulations. If in fact Congress considered the situation of these workers and set forth specifically the remedies which it felt would adequately deal with the situation (and there is every indication that this is what occurred), then we would indeed be ex-

ceeding our authority to ignore their will, and, in effect, legislate our own remedies.

This conclusion does not change as we examine the third and fourth *Cort* criteria. The third factor we are to consider is whether it is consistent with the underlying purpose of the legislative scheme to imply a remedy for the plaintiffs. In applying this factor, the *Cort* opinion explained that although "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose . . . in this instance the remedy sought would not aid the primary congressional goal." 422 U.S. 66, 84, 95 S.Ct. 2080, 2090, 45 L.Ed.2d 26 (1975). It is not surprising that the *Cort* opinion stressed the fact that implying a civil remedy was not necessary to make effective the congressional purpose. In most cases where cause of actions have been implied, it has been done to remedy the inadequacy of the express statutory means of enforcement. *See, e. g., J. I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); *Gomez v. Florida State Employment Serv.*, 417 F.2d 569 (5th Cir. 1969). As in *Cort*, we fail to see how it could be argued that the remedies available to the workers in our case are inadequate. Nor do we feel that it is necessarily consistent with the legislative goal of the Act (to fully develop the natural resources of the Shelf) to impose liability upon a lessee based upon violation of a departmental regulation when that lessee is admittedly free from fault.

The final factor which *Cort* commands us to consider is whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law. From what we have

previously stated, it is apparent that Congress, at least, felt that state law should govern this sort of controversy. Congress reached this conclusion not solely because there are "gaps" in the Federal Code, but also because it recognized that the individual states had a very real interest in the workers on these platforms. As Senator Long pointed out in his minority report to the Senate:

> A typical individual employed in operations in the shelf area will maintain his family in one of our coastal parishes; he will own or be buying his house and an automobile there. His children will attend Louisiana schools. If either he or a member of his family becomes ill, he will be cared for by a Louisiana doctor in a Louisiana hospital. After his employment in the shelf ends, he will continue to live in Louisiana and will spend his old age there.
>
> The children of these employees will attend a free public school, and be provided with free schoolbooks, supplies, lunches, and transportation. Our highways and streets will be traveled by both employer and employee. The State provides charity hospitals for the indigent sick. Care for those stricken with tuberculosis or mental diseases is provided by State-operated hospitals. A State-financed medical school now provides many of the doctors who will minister unto these people. The worker's person and property will be protected by our police. He will be protected from disease and sickness by our public health and sanitation offices. His elderly parents are likely to be receiving a pension during their period of nonproductivity.

> Louisiana provides a system of courts in which the employee will litigate many of his claims.
>
> Many of these same services will be provided for the oil company whose base of operations will be necessarily on Louisiana soil. The company will use our highways, will benefit from police protection, and make use of our courts.
>
> None can deny that the furnishing of such services to the thousands of shelf workers, their families, and the companies for which they work will be a heavy financial burden on the State and its subdivisions.

S.Rep.No.411 of the Committee on Interior and insular Affairs, 83d Cong., 1st Sess., 66, 67 (1953). We think that it is apparent, therefore, that this controversy should be controlled by state law. The concern of the state for these workers is real, and this concern was recognized and provided for by Congress in the actual provisions of the Act.

We are aware of the fact that brevity is not the chief attribute of this decision. We have gone to some lengths to explain ourholding because of the many lives and fortunes involved. Development of the Outer Continental Shelf will continue for generations, and, indeed, seems to be gaining added importance. All involved in these vital activities, employers and employees, have a right to know the "rules". Having reached this point, there is much left to be resolved including the applicable state law.

III. LOUISIANA LAW

[2] Having determined that federal law requires the plaintiffs to look to state law for redress, we now turn to plaintiffs alternative theory that Shell is strictly liable for the injuries sustained pursuant to Article 2322 of the Louisiana Civil Code. Article 2322 provides:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it,[9] or when it is the result of a vice in its original construction.

The text of Article 2322 reveals that several threshold issues must be considered before liability under the Article can accrue. The parties to the appeal have vigorously contested the meaning of "owner", "building", and "ruin" as applied to the facts of this case.[10]

[9] "Neglect to repair" means failure to keep in repair and does not require a showing of negligence. *See Adamson v. Westinghouse Electric Corp.* 236 So.2d 556 (La.App. 1970).

[10] Shell Oil Company contends that it cannot be held strictly liable pursuant to Article 2322 because it did not own the modular drilling rig containing the hot water heater which was placed upon the platform, not did it own the soil upon which the platform was placed. Shell also contends that, in effect, the hot water heater which exploded in this case is not an immovable by attachment within the meaning of *Cothern v. La Rocca*, 255 La. 673, 232 So.2d 473 (1970) because the hot water heater was not placed on the premises by the owner of the building as required by Article 467 of the Louisiana Code. The Court in *Cothern* recognized that an appurtenance or an immovable by attachment may be included within the term "building". Shell further argues that the fall or collapse of the drilling rig and platform did not result from "ruin" within the meaning of Article 2322, but rather resulted from the negligence of Movible Offshore, Inc.

The plaintiffs counter by arguing that the drilling rig need not be owned by the owner of the platform in order for Article 2322 to apply, and that the drilling rig is an immovable by attachment within the

The main issue of contention between the parties, however, is the purely legal question of whether an owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 for injuries sustained by employees of an independent contractor present on the platform for the purpose of conducting drilling operations. The district court denied recovery, holding that an employee of an independent contractor can not recover under Article 2322 unless performance of the work on the owner's premises is intrinsically dangerous.[11]

meaning of *Cothern* because it was attached in such a way that burning and cutting would be required to remove it. In addition, plaintiffs rely upon Article 464 of the Louisiana Code in support of thier contention that the drilling rig is an immovable by attachment. Article 464 provides:

Lands and buildings or other constructions, whether they have their foundation in the soil or not, are immovable by their nature. Article 464 has been interpreted to exclude the requirement that "other constructions" be placed upon the premises by the owner. *See Hilltop Bowl, Inc. v. United States Fidelity & Guaranty Co.*, 248 F.Supp. 572 (D.C.W.D.La. 1966); *Louisiana v. Illinois Central Railroad Company*, 256 So.2d 819 (La.App. 1972), *cert. denied* 260 La. 1136, 258 So.2d 381 (1972).

The plaintiffs also contend that the "ruin" was catastrophic and was caused by Shell's neglect to repair an appurtenance of the structure. The plaintiffs assert that it is irrelevant that Shell's "neglect to repair" was caused by a breach of duty by Movible Offshore, Inc.

[11] The Court stated in pertinent part:

Louisiana law is consistently to the effect that an injury to the employee of an independent contractor, caused by the contractor's negligence, does not impose strict liability on the building owner. *Henson v Traveler's Ins. Co.* 208 So.2d 366 (La.App. 1968), and cases cited therein. The only relevant exception appears to be where "the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed." *Vinton Petroleum Co. v. L. Seiss Oil Syndicate*, 19 L.App. 179 [182], 139 So.2d [139 So.] 543, 545 (1932).

Minute Entry of Trial Court, May 14, 1973 (R.503, 504).

If the theory of the plaintiffs' action against Shell was liability for the negligent acts of an independent contractor under the doctrine of respondeat superior, our task would not be nearly as difficult. In *Cole v. Louisiana Gas Co.*, 121 La. 771, 46 So. 801 (1908), the Louisiana Supreme Court long ago held that:

> The general rule is that the servants of an independent contractor must look to him (and not to the person with whom he has contracted) for injuries which they receive through his fault or negligence.

Id. at 779, 46 So. at 804. An exception to the general rule, as recognized in *Cole*, will arise if the work is inherently dangerous.

The theory of the plaintiffs' action, however, is not that Shell is liable for the acts of its independent contractor under the doctrine of respondent superior, but rather that Article 2322 imposed a strict statutory responsibility upon Shell to keep the platform and the appurtenances thereto free from ruin. Since the basis of the plaintiffs claim for damages in this case is strict liability, rather than negligence or respondeat superior, our inquiry must go beyond *Cole*.

The district court cited the cases of *Vinton Petroleum Co. v. L. Seiss Oil Syndicate, Inc.*,[11] and *Henson v. Traveler's Ins. Co.*,[13] in support of its conclusion that Shell is not liable to the plaintiffs under Article 2322. We are of the opinion that these cases are not dispositive of the issue and that a brief analysis of Louisiana jurisprudence will demonstrate the absence of clear and controlling precedent.

[11] 19 La. App. 179, 139 So. 543 (1932).

[13] 208 So.2d 366 (La. App. 1968), *cert. denied*, 252 La. 174, 210 So.2d 55 (1968).

Although both *Vinton* and *Henson* are cases involving claims under Article 2322, whether these cases support the holding of the district court is indeed uncertain. The *Vinton* case involved damage to the property of an adjoining property owner and not injury to an employee of an independent contractor. In addition, there is ambiguity in *Vinton* as to whether the Louisiana appellate court extended the general rule that an owner is not responsible for the acts of an independent contractor to cases involving Article 2322 strict liability.[14]

In *Henson*, an employee of an independent contractor was injured when he stepped in an unattended piling hole at a construction site. Although the injured employee in *Henson* did assert a claim based upon Article 2322 against the owner of the property, the plaintiffs argue that a simple negligence count was also asserted against the owner. The plaintiffs contend that Article 2322 is inapplicable because a hole in the ground is ob-

[14] In *Vinton*, the owner of an oil derrick hired a man named Buton to dismantle the derrick on his property. In the dismantling process, the derrick collapsed causing damage to the adjoining property owner (the plaintiff in this case). The plaintiff asserted a count based upon simple negligence and a count based upon Article 2322. The defendant denied all allegations in the complaint and further alleged that Burton was an independent contractor. The Court in the following sequence, made three findings:

(1) Burton was not an independent contractor so the landowner could not prevail on the defense to the negligence count.

(2) The plaintiff sustained his burden of proof under Article 2322 of establishing that the derrick was in a rotten or decayed condition at the time of the collapse.

(3) Even if Burton was an independent contractor, the defendant landowner would still be liable because the work was intrinsically dangerous.

The third holding sequentially follows the second holding but logically relates to the holding on the issue of negligence, not the holding on the issue of the decayed condition of the building. If the third holding relates to the first holding, *Vinton* clearly does not apply the independent contractor rule, and the intrinsically dangerous exception thereto, to Article 2322.

viously not an appurtenance of a building within the meaning of Article 2322,[15] and, therefore, the discussion in the case as to the liability of the owner to the injured employee deals with the negligence count.

Although we do not go so far as to accept the plaintiffs' interpretation of *Henson*, we are of the opinion that the holding of the Louisiana appellate court is unclear in light of the fact that there is uncertainty as to whether Article 2322 is applicable to facts in that case. More importantly, the discussion of liability in *Henson* deals with the issue of whether an owner is responsible under Article 2322 for the negligence of an independent contractor, and not whether an owner can be held strictly liable under Article 2322 for "neglect to repair" as a separate theory of liability independent of any fault or negligence of the contractor.[16]

Resolution of the issue of whether Shell is strictly liable to the plaintiffs in this case is further clouded by the case of *Temple v. General Ins. Co. of America*, 306 So.2d 915 (La.App.1974), *cert. denied*, 310 So.2d 643 (1975). The *Temple* Court found that because of a subcontractor's employee sustained his injuries while in the process of repairing a building, the ruin did not occur from "neglect to repair" within the meaning of Article

[15] The plaintiffs in their reply brief reason as follows:

The only presumption we make here is that the State Appellate Court [sic] could tell the difference between an appurtenance to a building and a hole in the ground, and did make that distinction. Since Article 2322 could not possibly have any play physically or legally, Henson's only theory could be that of simple negligence which was met with the defense of independent-contractor and exclusive-remedy.

Reply Brief of Appellants at p. 9

[16] We perceive this to be the narrow issue which the plaintiffs raise on appeal. *See, e.g. Camp v. Church Wardens of the Church of St. Louis*, 7 La.Ann. 321, 325 (1852).

2322.[17] Although the court expressly found that Article 2322 did not apply, the court proceeded to set forth what it deemed to be the determinative issue in a case involving injury to an employee of an independent contractor The court stated:

> The question of concern is whether the owner was in control of the premises or the contractor who was performing work of laying the bricks which fell causing injury to plaintiff. The answer appears obvious. Certainly the subcontractor, J. R. McFarland, d/b/a United Masonry Company, had control of the wall as the construction was not complete. A workman was working on the wall at the moment it fell. The evidence shows that a workman was striking the joints of the courses of brick when the newly constructed wall began to fall around him. Such a circumstance does not bring the injured plaintiff within the statutory liability imposed on the owner by LSA—C.C. Article 2322, and Article 670.

[17] In *Daroca v. Metropolitan Life Ins. Co.*, 121 F.2d 917 (5th Cir. 1941), an employee of an independent contractor was injured while working on the owner's premises. The Court stated:

> Plaintiff was neither a tenant nor a third person lawfully, but accidentally, on the premises nor a passerby. He was a workman engaged in making repairs to the building, employed for the very purpose of complying with the owner's duty to keep his building in repair. As to him there is no doubt whatever the owner was not responsible for any negligence of an independent contractor. *Camp v. Church Wardens*, 7 La. Ann.321; *Peyton v. Richards*, 11 La.Ann. 62; *Burton v. Davis*, 15 La.Ann. 448; *Gallagher v. Southwestern Exposition Ass'n*, 28 La. Ann. 943; *Robideaux v. Hebert*, 118 La. 1089, 43 So. 887, 12 L.R.A.N.S., 632. It is evident appellant can not recover on his first alleged cause of action.

Id. at 919. Shell has argued that *Daroca* is authority for denial of recovery by an employee of an independent contractor pursuant to Article 2322 under all circumstances. The plaintiffs counter by arguing that *Daroca* may deny recovery only when the employee is on the premises for the very purpose of repairing those premises. *See Harrison v. Blueberry Hill*, 255 F.2d 730 (3rd Cir. 1958).

> Counsel has not cited to us any case which holds these codal articles applicable to the construction or repair of a building. We find no liability herein. *See, Daroca v. Metropolitan Life Insurance Comapny*, 5 Cir., 121 F.2d 917; and *Matthews v. Southern Amusement Company*, La.App., 199 So.2d 403 (La.App. 3rd Cir. 1967).

Id. at 917, 918.

The Court of Appeals in *Temple* thus placed great emphasis upon control of the premises, an issue not expressly considered in *Henson.*[18] Furthermore, the emphasis upon control of the premises in *Temple* is conceptually inconsistent with other Louisiana case law providing that absent an agreement whereby a lessee assumes responsibility, a lessor-owner can be held strict-

[18] In *Camp v. Church Wardens of the Church of St. Louis*, 7 La.Ann. 321 (1852), the Chief Justice of the Louisiana Supreme Court stated that an owner was liable pursuant to Article 2302 of the Louisiana Code (the predecessor of Article 2322 and indentical in wording) for injuries sustained by an employee of a contractor on the premises. The owner had retained substantial supervisory authority over the work of the employees of the contractor doing the repairs. The finding of liability, however, was not premised upon the control retained by the owner. The Chief Justice stated:

> These provisions are entirely independent of the general rules concerning the responsibilities of masters and employers, and not in any manner connected with their relations, is shown conclusively by their place in the code. These articles are in the same chapter, and follow immediately that which provides for the latter, which is numbered 2299. They are evidently founded in an enlightened view of public necessity. They protect the neighbor; the passenger in the street; and it would be singular, indeed, if the men at work at the building were excluded from their just and salutory operation.

Id. at 325. Justice Slidell, in his concurring opinion, took a different approach. He emphasized the continuous and active control over the work by the owner. *Id.* at 326. *See also Faren v. Sellers*, 39 La.Ann. 1011, 3 So. 363 (1888).

ly liable under Article 2322 for injuries sustained by employees of the lessee, regardless of whether actual control of the premises is retained by the lessor. *See, e. g., Hornsby v. Ray,* 327 So.2d 146 (La.App. 1976), *cert. denied,* 330 So.2d 293 (La.1976); 330 So.2d 319 (La.1976).[19]

We have surveyed Louisiana law as presented by the briefs of counsel and as gathered from our own research, and we have concluded that there is no clear and controlling precedent from Louisiana's highest court to resolve several of the issues presented by this appeal. The issue which we perceive as most perplexing is whether Shell has available to it an "independent contractor" defense. We hesitate to accept Shell's argument and its interpretation of the *Henson* and *Vinton* cases, because of what appears to be a theoretical inconsistency between the imposition of a strict liability standard on a building owner, and at the same time providing an "independent contractor" defense which developed primarily in response to negligence actions and respondeat superior liability. Because the Supreme Court of Louisiana is the final expositor of Louisiana law, we feel compelled to certify the significant ques-

[19] The plaintiffs have also cited the case of *McIlwain v. Placid Oil Co.,* 472 F.2d 248 (5th Cir. 1973), in support of their contention that Shell be held strictly liable. Although *McIlwain* is factually similar to the present case, the issue of whether the owner can be held strictly liable to an employee of an independent contractor pursuant to Article 2322 was not considered on appeal. Viewed most favorably to the plaintiffs, *McIlwain* implies that an owner can be held strictly liable to employees of an independent contractor under Article 2322. *McIlwain* fails, however, to set forth supportive precedent or rationale, and serves to further render the issue unclear in light of the authorities cited herein.

tions requiring state law determination to that court.[20] We perceive these issues to include the following:

PROPOSED ISSUES TO BE CERTIFIED

(1) Whether the owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 of the Lousiana Civil Code absent the existence of intrinsically dangerous work and absent the exercise of control of the premises — when employees of an independent contractor hired by the owner are injured while on the platform by the explosion of a hot water heater located in the living module which caused part of the platform to fall or collapse, and when the employees are on the platform for the purpose of conducting drilling operations and not for the purpose of repairing or constructing the platform or any appurtenances or attachments thereto.

(2) Assuming that an owner cannot be held strictly liable to employees of an independent contractor without the existence of an intrinsically dangerous activity, whether drilling for oil on an offshore drilling platform constitutes "intrinsically dangerous work" within the meaning of *Vinton Petroleum Co. v. L. Seiss Oil Syndicate, Inc.*, 19 La.App. 179, 139 So. 543 (1st Cir. 1932), and as applied to Article 2322 of the Louisiana Civil Code.

(3) Whether injuries sustained by an employee of an independent contractor are the result of "ruin" of the

[20] We recognize the wisdom of utilizing the certification procedure and are merely attempting to stay within the wake of our own Admiral (Chief Judge Brown) who is currently aboard the "S.S. Certification" in route to Georgia, Florida and heavens knows where else. *See In Re McClintock*, 558 F.2d 732 (5th Cir. 1977); *Phillips v. Iglehart*, 558 F.2d 737 (5th Cir. 1977). Certification to the Louisiana Supreme Court is provided for by La.Rev.Stat.Ann. § 13:72.1 and Rule 12 of the Rules of the Louisiana Supreme Court.

building within the meaning of Article 2322 of the Louisiana Civil Code, when the fall or collapse of the building is caused by the explosion of a hot water heater attached to the living module of the platform.

(4) Whether a modular and movable drilling rig which is attached to an offshore drilling platform in such a manner that cutting and burning would be required to remove it, and which is not owned by the owner of the platform to which it is attached, constitutes an "immovable by attachmen" within the meaning of *Cothern v. La Rocca*, 255 La. 673, 232 So.2d 473, 477 (1970), and as applied to Article 2322 of the Louisiana Civil Code.

(5) Whether an owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 of the Louisiana Civil Code for injury sustained upon the platform, even though ownership of the underlying soil is not vested in the owner of the platform.

In accordance with the practice of the court, the clerk wil be instructed to seek the cooperation of counsel in formulating the precise questions to be certified. We recognize that there are several issues which have been raised with regards to indemnification that are still unresolved. These issues, however, become pertinent only if liability is placed upon Shell Oil Company. Therefore, we will reserve discussion of these issues until we have completed the certification process and the Supreme Court of Louisiana has had a chance to answer the questions so certified. If they should determine that Shell is liable under Louisiana law, we shall endeavor to answer the indemnification questions as expeditiously as possible. If Shell is not liable these questions become moot.

APPENDIX D

DENIALS OF REHEARING EN BANC

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 12)

Group 1 — Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2 — Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3 — Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Argonaut Ins. Co. v. Shell Oil Co.	75-4019	12/ 1/77	E.D.La., 561 F.2d 1178
Booker v. Shell Oil Co.	75-4019	12/ 1/77	E.D.La., 561 F.2d 1178
Carvin v. Shell Oil Co.	75-4019	12/ 1/77	E.D.La., 561 F.2d 1178
Dollar v. Long Mfg., N.C., Inc.	76-1018	11/30/77	M.D.Ga., 561 F.2d 613
Long Mfg., N.C., Inc. v. Nichols Tractor Co., Inc.	76-1018	11/30/77	M.D.Ga., 561 F.2d 613
Olsen v. Shell Oil Co	75-4019	12/ 1/77	E.D.La., 561 F.2d 1178
Shell Oil Co. v. Argonaut Ins. Co.	75-4019	12/ 1/77	E.D.La., 561 F.2d 1178
Shell Oil Co. v. Teledyne Movible Offshore, Inc.	75-4019	12/ 1/77	E.D.La., 561 F.2d 1178
Stewart v. Bailey	75-2996	12/ 7/77	N.D.Ala., 561 F.2d 1195
Teledyne Movible Offshore, Inc. v. Argonaut Ins. Co.	75-4019	12/ 1/77	E.D.La., 561 F.2d 1178
U.S. v. Alexander	76-1401	12/ 5/77	S.D.Fla., 559 F.2d 1339
U.S. v. Bowdach	76-2258	11/28/77	S.D.Fla., 561 F.2d 1160
U.S. v. James	77-1685	11/28/77	S.D.Tex., 562 F.2d 1259
Wallace v. Shell Oil Co.	75-4019	12/ 1/77	E.D.La., 561 F.2d 1178
GROUP 2			
Equal Employment Opportunity Commission v. D.H. Holmes Co., Ltd.	76-4184	12/ 5/77	E.D.La., 556 F.2d 787
Neidhardt v. D.H. Holmes Co., Ltd.	76-4184	12/ 5/77	E.D.La., 556 F.2d 787

APPENDIX E

Mary OLSEN, Plaintiff-Appellant
Cross Appellee,
v.
SHELL OIL COMPANY et al., Defendants-
Appellees Cross Appellants,
v.
ARGONAUT INSURANCE COMPANY,
Intervenor-Appellant.
Christine W. CARVIN, Plaintiff-Appellant
Cross Appellee,
v.
SHELL OIL COMPANY et al., Defendants-
Third-Party Plaintiffs Appellees-Cross Appellants,
v.
TELEDYNE MOVIBLE OFFSHORE, INC., et al.,
Third-Party Defendants-Appellees Cross Appellants,
Argonaut Insurance Company,
Intervenor-Appellant.
Frank Winston BOOKER et al.,
Plaintiffs-Appellees,
v.
SHELL OIL COMPANY et al.,
Defendants-Appellants.
Gordon Davis WALLACE, Plaintiff-Appellant
Cross Appellee,
v.
SHELL OIL COMPANY et al., Defendants-
Appellees Cross Appellants,
v.
ARGONAUT INSURANCE COMPANY,
Intervenor-Appellant.

ARGONAUT INSURANCE COMPANY,
Plaintiff-Appellant Cross Appellee,
v.
SHELL OIL COMPANY et al., Defendants-Appellees Cross Appellants.
No. 75-4019.
United States Court of Appeals,
Fifth Circuit.
May 12, 1978.
Rehearing Denied June 14, 1978

Consolidated appeals were taken from orders of the United States District Court for the Eastern District of Louisiana, Frederick J. R. Heebe, Chief Judge. The Court of Appeals, Fay, Circuit Judge, held that the court would certify to the Supreme Court of the State of Louisiana questions relating to the applicability of a provision of the Louisiana Civil Code in determining whether the owner of an offshore oil drilling platform can be held strictly liable for injuries sustained by employees of an independent contractor.

Question certified.

Federal Courts 392

Court of Appeals certified to Supreme Court of State of Louisiana questions relating to whether owner of offshore drilling platform could be held strictly liable to employees of independent contractor pursuant to provision of Louisiana Civil Code absent existence of intrinsically dangerous work and absent control of premises, whether offshore oil drilling constitutes "intrinsically dangerous work," whether injuries sustained by employee of independent contractor are result of "ruin" of building when caused by explosion of hot water heater attached to living module of platform, whether modular

drilling rig attached to platform but not owned by owner of platform constitutes an "immovable by attachment," and whether owner of platform could be held strictly liable for injuries sustained upon it even though ownership of underlying soil was not vested in platform owner. LSA—C.C. art. 2322.

Wm. P. Rutledge, Lafayette, La., for Olsen, et al.

Joel L. Borrello, New Orleans, La., for Argonaut Ins. Co.

Donald A. Hoffman, New Orleans, La., for Pacific Employers Insurance Co.

John O. Charrier, Jr., New Orleans, La., for Shell Oil Co.

W. K. Christovich, Charles W. Schmidt, III, New Orleans, La., for Teledyne Movible.

Francis G. Weller, New Orleans, La., for Wiegand Co. & Thermo-Disc., Inc.

Patrick T. Caffery, W. Eugene Davis, New Iberia, La., for Texsteam Corp.

Consolidated Appeals from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG and FAY, Circuit Judges, and DUMBAULD, District Judge.*

*District Judge for the Western District of Pennsylvania, sitting by designation.

FAY, Circuit Judge:

We have concluded that this appeal presents important issues of Louisiana law which we believe are appropriate for resolution by the Supreme Court of Louisiana. Our final decision in this matter will therefore be deferred pending certification of the issues to the Supreme Court of Louisiana.

We have requested that the parties submit a proposed agreed statement of facts and certificate of issues for decision pursuant to our general practice. *See West v. Caterpillar Tractor Co., Inc.*, 504 F.2d 967 (5th Cir. 1974).

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF LOUISIANA PURSUANT TO LA.REV.STAT.ANN. § 13:72.1 AND RULE 12 OF THE RULES OF THE LOUISIANA SUPREME COURT.

It appears to the Unites States Court of Appeals for the Fifth Circuit that the above-styled case in this court involves questions or propositions of the law of the State of Louisiana which are determinative of this cause, and there appear to be no clear, controlling precedents in the decisions of the Supreme Court of the State of Louisiana. This Court certifies the following questions of law to the Supreme Court of Louisiana for instructions concerning said questions of law, such case being on appeal from the United States District Court for the Eastern District of Louisiana.

I. STYLE OF THE CASE

The style of the case in which this certification is made is Mary Olsen, et al., Plaintiffs-Appellants, versus Shell Oil Company, et al., Defendants-Appellees; Christine W. Carvin, et al., Plaintiffs-Appellants, versus Shell Oil Company, et al., Defendants-Appellees; Gordon Davis Wallace, Plaintiff-Appellee, versus Shell Oil Company, et. al., Defendants-Appellees; and Argonaut Insurance Company, Plaintiff-Appellant, versus Shell Oil Company, et al., Defendants-Appellees, Case No. 75-4019, United States Court of Appeals for the Fifth Circuit, on appeal from the United States District Court for the Eastern District of Louisiana.

II. STATEMENT OF THE FACTS

A complete statement of the facts of this case, showing the nature of the case and the circumstances out of which the questions or propositions of law arise, can be found at 561 F.2d 1178, 1180, and will not be set forth in full in this certification.

III. QUESTIONS FOR THE SUPREME COURT OF LOUISIANA

The parties have been unable to agree on the precise questions for certification. We have concluded that the following questions delineate the issues and accordingly certify them to the Supreme Court of the State of Louisiana.

(1) Whether the owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 of the Louisiana Civil Code absent the existence of intrinsically dangerous work and absent the exer-

cise of control of the premises — when employees of an independent contractor hired by the owner are injured while on the platform by the explosion of a hot water heater located in the living module which caused part of the platform to fall or collapse, and when the employees are on the platform for the purpose of conducting drilling operations and not for the purpose of repairing or constructing the platform or any appurtenances or attachments thereto.

(2) Assuming that an owner cannot be held strictly liable to employees of an independent contractor without the existence of an intrinsically dangerous activity, whether drilling for oil or an offshore drilling platform constitutes "intrinsically dangerous work" within the meaning of *Vinton Petroleum Co. v. L. Seiss Oil Syndicate, Inc.*, 19 La.App. 179, 139 So. 543 (1st Cir. 1932), and as applied to Article 2322 of the Louisiana Civil Code.

(3) Whether injuries sustained by an employee of an independent contractor are the result of "ruin" of the building within the meaning of Article 2322 of the Louisiana Civil Code, when the fall or collapse of the building is caused by the explosion of a hot water heater attached to the living module of the platform.

(4) Whether a modular and movable drilling rig which is attached to an offshore drilling platform in such a manner that cutting and burning would be required to remove it, and which is not owned by the owner of the platform to which it is attached, constitutes and "immovable by attachment" within

the meaning of *Cothern v. La Rocca*, 255 La. 673, 232 So.2d 473, 477 (1970), and as applied to Article 2322 of the Louisiana Civil Code.

(5) Whether an owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 of the Louisiana Civil Code for injury sustained upon the platform, even though ownership of the underlying soil is not vested in the owner of the platform.

APPENDIX F

Mary OLSEN, Plaintiff,

v.

SHELL OIL COMPANY, Defendant.

No. 62522.

Supreme Court of Louisiana.

Nov. 16, 1978.

As Corrected on Rehearing Denied

Jan. 26, 1979.

Questions of state law were certified by the United States Court of Appeals for the Fifth Circuit. The Supreme Court, Tate, J., held that: (1) fixed offshore drilling rig was "building" within meaning of statute imposing liability upon building owner to persons injured through its ruin whether due to vice in original construction of building or through owner's neglect to repair it; (2) owner of rig was "owner," for purposes of statute, of defective modular living unit attached to drilling rig; (3) explosion of water heater within modular living unit constituted "ruin" of building within meaning of statute; (4) rig owner was not exculpated from liability for injuries and death caused by explosion on ground that damages were caused by fault of third person, and (5) rig owner's liability was not affected by fact that underlying soil upon which rig rested was owned by another party.

Certified questions answered.

Dixon, J., concurred and filed opinion.

Sanders, C.J., dissented and assigned written reasons.

Summers, J., dissented.

Marcus, J., dissented and filed opinion.

Summers, C.J., and Marcus, J., would grant application for rehearing.

1. Negligence 44

Owner's fault, under statute imposing liability upon owner of building to persons injured through its ruin, is founded upon breach of his obligation to maintain or repair his building so as to avoid creation of undue risk of injury to others; owner is absolved from his strict liability neither by his ignorance of condition of building, nor by circumstances that defect could not easily be detected; he is absolved from such liability only if the thing owned by him falls, not because of its defect, but rather because of fault of some third person or of person injured thereby, or because fault is caused by irresistible cause or force not usually foreseeable. LSA—C.C. arts. 2322, 3556, subds. 14, 15.

2. Negligence 44

As regards term "building," for purposes of statute imposing liability upon owner of building to persons injured through its ruin, inherent requirement is that there be a structure of some permanence; permanent structure need not be intended for habitation for it to be considered a building. LSA—C.C. art. 2322.

See publication Words and Phrases for other judicial constructions and definitions.

3. Negligence 44

Fixed offshore drilling platform which had foundation in the soil was "building" for purposes of statute imposing liability upon owner of building to persons injured through its ruin, whether or not intended for habitation. LSA—C.C. art. 2322.

4. Negligence 44

Necessary appurtenances to structures and movables made immovable by attachment, which are defective or have fallen into ruin, also may be included within term "building" for purposes of statute imposing liability upon owner of building to persons injured through its ruin. LSA—C.C. art. 2322.

5. Negligence 44

In absence of another statute providing otherwise, strict liability imposed by statute upon owner of building for harm caused by defects in its structures or appurtenances imposes nondelegable duty upon owner to keep his building and appurtenances in repair and to be responsible to third persons for harm caused by any defect in structure or its appurtenances. LSA—C.C. art. 2322.

6. Negligence 54

As regards statute imposing liability upon owner of building to persons injured through its ruin, building owner, by contractual agreement between himself and occupant who "owns" appurtenance incorporated into structure of building, may regulate their relative owner-

ship or duties of indemnification to one another resulting from injury to third persons; owner cannot by such contract, however, limit his law-imposed liability to third persons for unjuries arising from premise defects; for same reasons, neither can he, by contractual agreement relating to ownership of appurtenant parts by occupier, absolve himself from liability to third person from injuries resulting from premise defect in any part of his premises, including in occupier-owned appurtenant parts attached to his building so as to become a part of it. LSA—C.C. art. 2322.

7. Negligence 54

Owner of fixed offshore drilling rig was "owner" of rig and of modular living unit which was attached to rig and in which explosion causing injuries and death to third persons took place, for purposes of statute imposing liability upon owner of building to persons injured through its ruin, notwithstanding rig owner's contractual relationship with drilling contractor which, as between those two parties, remained owner of modular living unit. LSA—C.C. art. 2322.

See publication Words and Phrases for other judicial constructions and definitions.

8. Negligence 44

Explosion of water heater within modular living unit attached to offshore drilling rig was "ruin" of drilling rig within meaning of statute imposing liability upon owner of building to persons injured through its ruin whether caused by neglect to repair building or by a vice in its original construction, notwithstanding contention that explosion was caused by negligent failure of occupier of modular living unit to install correct valve in water heater. LSA—C.C. art. 2322.

See publication Words and Phrases for other judicial constructions and definitions.

9. Negligence 62(3)

Owner of building may be exculpated from liability under statute imposing liability upon building owner to persons injured through its ruin for premise defect if victim is injured not by reason of defect but instead because of fault of some third person. LSA—C.C. art. 2322.

10. Negligence 62(3)

Building owner's agreement with or reliance upon contractor or tenant to perform owner's nondelegable duty to keep his building in repair and free of defect constituting unreasonable risk of injury to others does not constitute that contractor or tenant a "third person" for purposes of exculpation of building owner from statutory liability for premise defect if victim is injured not by reason of defect but instead because of fault of some third person. LSA—C.C. arts 670, 2322.

See publication Words and Phrases for other judicial constructions and definitions.

11. Negligence 62(3)

Fault of "third person" which exonerates building owner from his own obligation importing strict liability as imposed by statute making building owner liable to persons injured through ruin of building and by other statutes is that which is sole cause of the damage, of the nature of an irresistible and unforeseeable occurence, that is, where damage resulting has no casual relationship whatsoever through fault of owner in failing to keep his building in repair, and where "third person" is stranger rather than person acting with consent of owner in performance of owner's nondelegable duty to keep his building in repair. LSA—C.C. arts. 2317, 2321, 2322.

12. Negligence 62(3)

Principle that building owner may be exculpated from liability under statute imposing liability upon building owner to persons injured through its ruin for premise defect if victim is injured not by reason of defect but instead because of fault of some third person was inapplicable to owner of fixed offshore drilling rig, which asserted that it was exculpated from liability to third persons injured by explosion which took place within modular living unit attached to drilling rig on ground that damages were in fact caused by intervening fault of drilling contractor which occupied modular living unit and which negligently failed to repair defective water heater valve which caused explosion. LSA—C.C. arts. 2317, 2321, 2322.

13. Negligence 44

Liability of owner of fixed offshore drilling rig under statute imposing liability upon building owner to persons injured through its ruin was not affected by circumstance that underlying soil upon which building rig rested was owned by another party. LSA—C.C. arts. 464-464 comment, 2320, 2322.

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Douglas A. Molony, Bernard J. Caillouet, Gene S. Palmisano, M. Truman Woodward, Jr., H.H. Hillyer, Jr.,

Wilson S. Shirley, Jr., James K. Irvin, M. Hampton, Carver, W. Richard House, Jr., Milling, Benson, Woodward, Hillyer & Pierson, New Orleans, amicus curiae for Chevron U.S.A., Inc. and Exxon Corp.

TATE, Justice.

The United States Court of Appeals for the Fifth Circuit certified to us for our opinion certain questions of state law. Olsen v. Shell Oil Co., 561 F.2d 1178 (1977). Ther certification was in accordance with the procedure authorized by La.R.S. 13:72.1 (1972) and Rule 12, Rules of the Supreme Court of Louisiana (1973).

Certain employees of a drilling contractor ("Movible") were killed or injured, and they or their representatives sue to cover damages thereby sustained. As set forth more fully in Appendix 1 to this opinion:

The injuries and deaths resulted from the explosion of a water heater aboard a fixed drilling platform owned by Shell Oil Company situated in the Gulf of Mexico offshore of Louisiana. Pursuant to a drilling contract with Shell, Movible had attached (in such a way that burning and cutting of metal would be required to remove it) its modular drilling rig onto the platform, and a modular living unit to house Movible's drilling employees. The explosion of the water heater which caused the injuries (and which was part of the living quarters) resulted from Movible's failure to repair properly or to replace a pressure relief valve of the heater after having been warned to do so by a safety engineer.

The issue before us concerns Shell's liability for the injuries and deaths by reason of its *ownership* of the drill-

ing platform, Louisiana Civil Code Article 2322 (1870).[1] The Fifth Circuit, having determined that federal law requires the plaintiffs to look to Louisiana law for redress,[2] found itself unable to determine whether Shell is liable under Civil Code Article 2322 and Louisiana jurisprudence thereunder.

Accordingly, that court certified five questions to us for our opinion as to state law applicable. Four questions query as to Shell's strict liability as owner of the drilling platform,[3] which are answered below in our discussion of

[1] La.C.C. art. 2322 provides: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

[2] The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. (1953) makes Louisiana law applicable to fixed offshore platforms. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

[3] These four questions are:

(1) Whether the owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 of the Louisiana Civil Code absent the existence of intrinsically dangerous work and absent the exercise of control of the premises — when employees of an independent contractor hired by the owner are unjured while on the platform by the explosion of a hot water heater located in the living module which caused part of the platform to fall or collapse, and when the employees are on the platform for the purpose of conducting drilling operations and not for the purpose of repairing or constructing the platform or any appurtenances or attachments thereto.

(3) Whether injuries sustained by an employee of an independent contractor are the result of "ruin" of the building within the meaning of Article 2322 of the Louisiana Civil Code, when the fall or collapse of the building is caused by the explosion of a hot water heater attached to the living module of the platform.

liability and defenses under Civil Code Article 2322. In view of the conclusions we reach below as to Shell's strict liability, the remaining question[4] need not be answered by us.

I. LIABILITY UNDER CIVIL CODE ARTICLE 2322.

Article 2322 imposes liability upon the owner of a building to persons injured through its "ruin", whether due to a vice in its original construction or through his neglect to repair it.[5]

(4) Whether a modular and movable drilling rig which is attached to an offshore drilling platform in such a manner that cutting and burning would be required to remove it, and which is not owned by the owner of the platform to which it is attached, constitutes an "immovable by attachment" within the meaning of *Cothern v. La Rocca*, 255 La. 673, 232 So.2d 473, 477 (1970), and as applied to Article 2322 of the Louisiana Civil Code.

(5) Whether an owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 of the Louisiana Civil Code for injury sustained upon the platform, even though ownership of the underlying soil is not vested in the owner of the platform.

[4] The remaining question certified to us is:

(2) Assuming that an owner cannot be held strictly liable to employees of an independent contractor without the existence of an intrinsically dangerous activity, whether drilling for oil on an offshore drilling platform constitutes "intrinsically dangerous work" within the meaning of *Vinton Petroleum Co. v. L. Seiss Oil Syndicate, Inc.*, 19 La.App. 179, 139 So. 543 (1st Cir. 1932), and as applied to Article 2322 of the Louisiana Civil Code.

[5] See also Civil Code Article 670: "Every one is bound to keep his buildings in repair, so that neither their fall, nor that of any part of the materials composing them, may injure the neighbors or passengers [passers-by], under the penalty of all losses and damages, which may result from the neglect of the owner in that respect."

[1] The owner's fault is founded upon the breach of his obligation to maintain or repair his building so as to avoid the creation of undue risk of injury to others. The owner is absolved from its strict liability neither by his ignorance of the condition of the building, nor by circumstances that the defect could not easily be detected. He is absolved from such liability only if the thing owned by him falls, not because of its defect, but rather because of fault of some third person or of the person injured thereby, or because the fault is caused by an irresistible cause or force not usually foreseeable. Article 3556(14), (15), (usually, an act occasioned exclusively by violence of nature without the interference of or contribution by any human agency).

See: *Klein v. Young*, 163 La. 59, 111 So. 495 (1927); *Thompson v. Commercial National Bank*, 156 La. 479, 100 So. 688 (1924); *Barnes v. Beirne*, 38 La.Ann. 280 (1886); *Camp v. Church Wardens*, 7 La.Ann. 321 (1852); *Crawford v. Wheless*, 265 So.2d 661 (La.App.2d Cir., 1972); *Anslem v. Travelers Insurance Company*, 192 So.2d 599 (La. App.3d Cir., 1966); *Green v. Southern Furniture Company*, 94 So.2d 508 (La.App.1st Cir., 1957); Comment, 42 Tul.Law Rev. 178 (1967).

Under the terms of Article 2322, several requirements for the imposition of liability under the article must be met: (1) There must be a building; (2) the defendant must be its owner; and (3) there must be a "ruin" caused by a vice in construction or a neglect to repair, which occasions the damage sought to be recovered.

1. *Is Shell's Platform a "Building" Within the Meaning of Article 2322?*

The word "building" as used in Article 2322 has received no clear jurisprudential definition. This court itself has never spoken directly to the question whether an oil derrick or drilling platform constitutes a building within the meaning of the article.

Nevertheless, some Louisiana jurisprudence indicates that an oil derrick is a building for purposes of imposing liability under the code article. *Vinton Petroleum Co. v. L. Seiss Oil Syndicate,* 19 La.App. 179, 139 So. 543 (1932). The United States Fifth Circuit Court of Appeals has relied on the *Vinton* decision, in holding that fixed offshore drilling platforms constitute buildings for such purposes. *Mott v. Odeco, 577 F.2d 273 (1978); Moczygemba v. Danos & Curole Marine Contractors,* 561 F.2d 1149 (1977); *McIlwain v. Placid Oil Company,* 472 F.2d 248 (1973) certiorari denied, 412 U.S. 923, 93 S.Ct. 2734, 37 L.Ed.2d 150 (1973).

[2] Without making specific reference to oil derricks, this court has made several observations as to what constitutes a building under the article. An inherent requirement is that there be a structure of some permanence. *Mudd v. Travelers Indemnity Co.,* 309 So.2d 297 (La.1975). Also, the permanent structure need not be intended for habitation, for it to be considered a "building." *Cothern v. LaRocca,* 255 La. 673, 232 So.2d 473 (1970). Additionally, we have held, for instance, that, for purposes of delictual responsibility under Article 2322, the word "building" encompasses a wharf or walkway over water which gave access and was attached to a camphouse. *Cristadoro v. Von Behren's Heirs,* 119 La. 1025, 44 So. 852 (1907). See also *Howe v. City of New Orleans,* 12 La.Ann. 481 (1857).

The wording "building" in Article 2322 is translated from the word "batiment" in its corresponding article of the French Civil Code, Article 1386. "Batiment" is defined in Bescherelle's *Dictionnaire National* (1844) as "a generic term designating all edifices public or private, regardless of the type material composing them, but most particularly those which serve as habitations." (The writer's translation.) Traditionally, French jurisprudence has interpreted the word "batiment" broadly; according to an autoritive French treatise, numerous French authors consider it to include all works of man, synonymous with the word "construction" (including structures both movable and immovable, whether temporary or permanent).[6] The treatise would more narrowly define the word, at least limiting it to immovables, and the tendency of modern French jurisprudence has been so to interpret the word more narrowly?[7]

Louisiana Civil Code Article 464 (1870) provides that "buildings or other constructions, whether they have their foundations in the soil or not, are immovable by their nature." See also Civil Code Articles 463 and 464, as re-enacted in 1978. In the context of the Louisiana Civil Code, a "building" is a type of permanent construction that would be classified as an immovable.

[3] Without further defining the limits of a "building" within the meaning of Article 2322, it is sufficient for present purposes to hold that a permanent structure,

[6] 2 Mazeaud & Mazeaud, Traite Theorique et Practique de la Responsabilite Civile, Vol. 2, Section 1039, pp. 26-29 (6th ed. 1970).

[7] For a general discussion of the meaning of the word, see Mazeaud, *id.;* Comment, Article 2322 and the Liability of the Owner of an Immovable, 42 Tul.L.Rev. 178, especially 182-84 (1968).

such as the fixed drilling platform owned by Shell and which has a foundation in the soil, is indeed a building for purposes of that article, whether or not intended for habitation.[8] This result is consistent with and analogous with our earlier holdings summarized above.

The defendant further argues that federal law dictates that we hold Shell's drilling platform to be an island, and therefore an extension of the soil, rather than a building.[9] In support of this thesis, the defendant cites *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969) and *In Re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1974).

We find no merit to this argument. The cited decisions concern a choice of law question, federal maritime law versus state law. They do not touch upon nor concern the classification of a drilling platform as land or soil rather than as a building.[10]

As previously noted, the federal courts have reached, correctly, the same conclusion as we do now, i.e., that a drilling platform such as the present is a building within the meaning of Article 2322: See *Mott, Moczygemba, and McIlwain*, cited above.

[8] It should be pointed out that, even if we were to hold that the platform is not a "building" within the meaning of Article 2322, it would not necessarily follow that the defendant is free from liability. While Article 2322 provides a special rule of strict liability for buildings, Article 2317 provides the general rule of strict liability for "things." See, *Loescher v. Parr*, 324 So.2d 441 (La. 1975).

[9] According to this characterization, Shell would be the owner of the *"land"* or *"soil"* upon which Movible affixed a building. It could not therefore, it is argued, be subject to the liability of the owner of a *building*.

[10] The question addressed in the cited cases was whether fixed drilling platforms located beyond the three mile limit should be

2. *Is Shell the "Owner", for Purposes of Article 2322 Liability, of the Defective Attachments to Its Drilling Platform?*

By contract between Shell and Movible, Movible retained the ownership of its drilling rig and of its living unit attached to Shell's drilling platform. (Movible's modular living unit included the defective water heater as a component part thereof.) Much of the argument of both parties is addressed to this issue of ownership. Unquestionable, *as between Shell and Movible,* the latter remained the owner of its drilling rig and living unit.

The true issue, however, is whether by reason of this contractual circumstance, Shell is relieved of its obligation as owner of the "building" (i. e., the fixed drilling platform) for its strict liability under Article 2322 for injuries caused by any defect in it or its appurtenances.[11]

[4] Preliminarily, we note that "necessary appurtenances to structures and movables made immovable by attachment, which are defective or have

characterized as vessels, in which case the law applicable to actions for death on the rig would be the Death on the High Seas Act, 46 U.S.C. § 761 et seq. (1920), or instead as *artificial* islands, in which case the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. (1953), would provide the applicable law. In *Rodrigue,* the United States Supreme Court interpreted the Outer Continental Shelf Lands Act to mean that these structures were to be treated as though they were federal enclaves in an upland state so that federal law, supplemented by the state law of the adjacent state controlled in death actions. The language of the decision clearly indicate that the court did not contemplate characterizing the rigs (fixed structures to the nature of artificial islands) as "land" as opposed to "buildings" for purposes of either federal or state law.

[11] By the questions presented, we are not required to address the issue of any concurrent liability under Articles 2315-17 or 2322 of Movible for the defective part of Shell's "building" under its control (and owned by Movible, per contractual agreement between Shell and Movible).

fallen into ruin, also may be included within that term 'building' " for purposes of the building-owner's delictual responsibility under Article 2322. *Cothern v. LaRocca*, 255 La. 673, 232 So.2d 473, 477 (1970). See also *Dunn v. Tedesco*, 235 La. 679, 105 So.2d 264 (1958) (water heater).[12] Thus, the Fifth Circuit has correctly held that the owner of a fixed drilling platform (a "building") is liable for injuries resulting from a defect in an appurtenant drilling rig which (as in the present case) was welded onto the building by a drilling contractor which (as between itself and the platform owner) retained title to this appurtenant attachment. *Moczygenba v. Danos and Curole Marine Contractors*, 561 F.2d 1149 (CA 5, 1977).

In attacking the conclusion reached in the cited *Moczygemba* decision, Shell argues that because its drilling contractor (Movible) owned the living unit attached so as to become part of Shell's building (the drilling platform), Shell cannot be held delictually responsible for defects in the living unit, insofar as sought to be based on the strict liability of an *owner* under Article 2322 for defects in its buildings or appurtenant or component parts thereof.

In our view, this argument overlooks the basis for the delictual obligation of the owner of a building for damages caused by defects in its structure or appurtenances:

[12] Other Louisiana cases which have held the owner of a building liable under this "appurtenance doctrine" include, for instance, *Adamson v. Westinghouse Electric Corp.* 236 So.2d 556 (La.App.1970) (elevator), *Fontenot v. Sarver*, 183 So.2d 75 (La.App. (1966) window fan), and *Murphy v. Fidelity and Casualty Co.*, 165 So.2d 497 (La.App.2d Cir. 1964) (electrical wiring).

"The obligation of every property owner to answer for damages for a failure to keep his property in such condition of repair that it will not be dangerous to other persons is imposed by law, by Articles 670, 2315, 2322 of the Civil Code." *Klein v. Young*, 163 La. 59, 69, 111 So. 495 (1927). In *Klein*, this court held that, although the owner of the premises could by contract "allow another person to use the property for any particular purpose" and could thus regulate the rights as *between owner and contractual occupant*, the owner could not by such contract evade his obligation imposed by law to repair harm to others resulting from defects in his premises.

[5] The decisions previously cited have imposed Article 2322 liability upon the owner of a building for defects in its appurtenant structures without consideration of whether the thing attached to a building has become an immovable by nature or by destination under property law concepts, and without consideration of whether there is unity of ownership of the building and its appurtenance. In the absence of another statute providing otherwise, the strict liability under Article 2322 of the owner of a building for harm caused by defects in its structure or appurtenances imposes a nondelegable duty upon him to keep his building and appurtenances in repair and to be responsible to third persons for harm caused by any defect in the structure or its appurtenances.[13]

[13] There are two competing notions of the theoretical basis of the strict liability of the owner for the harm caused by his building, the "fault" theory and the "risk" theory. For a general discussion of these competing theories, see Starck, The Foundation of Delictual Liability in Contemporary French Law, 48 Tul.L.Rev. 1043 (1974); Comment, Article 2322 and the Liability of the Owner of an Im-

[6, 7] By contractual agreement between himself and the occupant who "owns" the appurtenance incorporated into the structure of the building, the owner of the building may regulate their relative ownership or duties of indemnification to one another resulting from injury to third persons. The owner cannot by such contract, however, limit his law-imposed liability to third persons for injuries arising from premise defects. *Klein v. Young*, 163 La. 59, 111 So. 495 (1927). For the same reasons, neither can he, by contractual agreement relating to the ownership of appurtenant parts by an occupier, absolve himself from liability to third persons from injuries resulting from premise-defects in any part of his premises, including in occupier-owned appurtenant parts attached to his building so as to become a part of it.

In view of this conclusion, we need not discuss Shell's additional argument that no liability attaches to it because the modular living unit attached to its building (the drilling platform) did not become an immovable by

movable, 42 Tul.L.Rev. 178, especially footnotes 3, 22, and 53.

Basically, the "fault" theory is that even though we hold the owner of the building strictly liable, this liability is based on his "fault" in failing to attend to his building. For a thorough discussion of this theory, see Mazeaud and Mazeaud, Traite Theorique et Pratique de la Responsibilite Civile, § 1063-1070, pp. 48-53 (6th ed. 1970).

The "risk" theory is based on the notion that, even though the owner may have a right of indemnification against some third person, he must bear the primary responsibility for damage caused by the building as the quid pro quo for the advantages and powers of ownership of the building. This theory of liability is quite similar to the notion of "enterprise liability", which reflects a policy determination that the person or entity that causes risk to the public through some enterprise should be responsible for the damage caused by the enterprise so that the cost of the damage will be allocated as an expense of the enterprise. See, Prosser, Law of Torts, Section 69 (4th ed. 1971).

nature under Civil Code Article 467 (1870; as amended in 1912), since it was attached to the building by a person (Movible) other than the owner. Because the appurtenant living unit was part of the building for purposes of Article 2322, cf. also La.C.C. art. 508 (1870), it is immaterial whether it is technically immobilized or not under Article 467 (1972) for purposes of determining rights between Shell and Movible and their respective creditors or purchasers.[14]

3. *Did the explosion of the water heater constitute a "ruin" of the building under Article 2322 so to impose liability upon the building's owner for damages occasioned thereby?*

[8] Shell argues that the explosion of the water heater, caused by the negligent failure of the occupier Movible to install the correct valve in it, is not a "ruin" of the building which was the result of a "neglect to repair" it or "a vice in its original construction", as required by Article 2322.

[14] The revision of Article 467 in 1912, upon which Shell relies, had as a primary purpose to protect, against the landlord's creditors and purchasers the interest of tenants in incidental attachments to a building made for their own convenience. Yiannopoulos, Civil Law of Property, Section 47 (Louisiana Civil Law Treatise, Volume 2; 1966); Comment, 20 La.L.Rev. 410, 413 (1960). The immobilization issue raised by Shell would if applicable, include a consideration of whether the attachment of the living unit and drilling rig to the platform was of so substantial a nature as instead to be the incorporation of them into the building as an integral and component part of it, Civil Code Article 464 (1870; cf. Article 465 (1978), and of whether the substantial attachments in question were within the terms and intent of Article 467 (1912) or met certain technical requirements of that code article, insofar as it inhibits the immobilization which would normally flow from attachment to the building. *See Yiannopoulas*, cited above, *id.*

See also La.Civ.Code Article 466 (1978).

We find no merit to this contention, for reasons stated in our previous discussion. There, we noted that Louisiana jurisprudence interpreting Article 2322 has held that the owner of a building has a non-delegable duty to keep his buildings and its appurtenances in repair so as to avoid unreasonable risk of injury to others, and that he is held strictly liable for injuries to others resulting from his failure to perform this duty imposed by law upon him. As likewise noted, the premise owner's liability under Article 2322 extends to damages resulting from defects in appurtenances such as window fans and water heaters. See footnote 12 and surrounding text.

Shell's reliance upon certain language in *Davis v. Royal-Globe Insurance Co.*, 257 La. 523, 242 So.2d 839 (1970) is misplaced. That decision held that the owner-landlord was not liable for the lead poisoning of a tenant's children who had eaten paint flakes which had fallen from the ceiling. The court felt that the intermittent peeling, flaking, and fall of paint particles to the floor did not constitute a "ruin" for purposes of Article 2322, since that term referred to "the actual fall or collapse of a building or one of its components", 242 So.2d 841, or a situation " 'in which some part of the building collapses, or breaks, or gives way' ", 242 So.2d 842 (i. e., as compared to the intermittent falling of paint flakes from a ceiling).

Whatever the merits of that particular ruling, the decision did not in terms or context intend to modify the jurisprudence previously cited that an owner is liable under Article 2322 for injuries resulting from a defective condition which causes a breaking or explosion of an appurtenant or component part of the building.

II. DEFENSES RAISED TO LIABILITY UNDER ARTICLE 2322, IF FOUND APPLICABLE.

[9] An owner may be exculpated from liability under Article 2322 for a premise-defect, if the victim is injured not, by reason of the defect, but instead because of the fault of some third person. See *Loescher v. Parr*, 324 So.2d 441, 445 (La.1975), and decisions therin cited.

On this basis, Shell claims exculpation. It argues that the damages were in fact caused by the intervening fault of a third person, its independent contractor Movible, which negligently failed to repair the defective water-heater valve.

[10] We have previously noted that the owner has a non-delegable duty imposed by Articles 670 and 2322 to keep his building in repair and free of defects constituting an unreasonable risk of injuries to others. The owner's agreement with or reliance upon a contractor or tenant to perform this duty imposed by law on *him*, the owner, does not constitute that contractor or tenant a "third person" for purposes of exculpating the owner from his liability under these code articles. See: *Klein v. Young*, 163 La. 59, 111 So. 495 (1927; *Camp v. Church Wardens*, 7 La.Ann. 321 (1852).

The latter decision holds that, insofar as the victim is concerned, the owner is liable because of his obligation imposed by the code articles ("from the policy of the law alone", 7 La.Ann. 325), but the contractor also may be held liable for his independent fault in the constitution. Somewhat similarly, the analagous strict liability under Article 670 (1870) of a propietor not to make any work on his land which causes damage to his neighbor, imposes

responsibility for such damages upon both the proprietor and his independent contractor performing the work. *Lombard v. Sewerage & Water Board*, 284 So.2d 905 (La.1973); *D'Albora v. Tulane University*, 274 So.2d 825 (La.App.4th Cir. 1973).

[11, 12] The fault of a "third person" which exonerates a person from his own obligation importing strict liability as imposed by Articles 2317, 2321, and 2322 is that which is the sole cause of the damage, of the nature of an irresistible and unforseeable occurance[15]—i. e., where the damage resulting has no casual relationship whatsoever to the fault of the owner in failing to keep his building in repair, and where the "third person" is a stranger rather than a person acting with the consent of the owner in the performance of the owner's non-delegable duty to keep his building in repair.

[15] See especially Section 1652 of the Mazeaud treatise, cited at the conclusion of the paragraph in the text as authority for its statements.

Thus, the owner or custodian of a defective building, thing, or animal is not relieved of his responsibility and strict liability to a victim injured thereby by the circumstance that the fault or negligence of a third person contributed to the injury, unless the intervening third person's act or fault is in the nature of a superseding cause in Anglo-American tort law. See Restatement of Torts, 2d, Sections 440-453 (1965). The consideration for determining that an intervening act or force is a superseding cause of the harm, as to which the actor's antecedent fault was a substantial causal factor, include, for instance, that the harm is different in kind than that would have otherwise resulted, that it is of an extraordinary nature or operates independently of any situation created by the actor's fault, Section 442; but the intervening act or force is a concurrent rather than superseding cause when the fault of the actor created or increased the foreseeable risk of harm through such an intervening act, or when such intervening act is a normal and non-extra-ordinary consequence of the situation created by the actor's fault, Sections 442A, 443, 447.

See: Mazeaud and Mazeaud, Traite Theorique et Pratique de la Responsibilite Civile, Delictuelle et Contractuelle, Sections 1068-70 (pp. 51-53), Sections 1622-85 (pp. 74-80), especially Sections 1622, 1630, 1637, 1644, 1646-48, 1652 (6th ed. 1970).

In view of this conclusion, we find no merit to the defendant's argument that the building-owner might somehow be exculpated from his liability under Article 2322 to keep the building in safe repair, because the damages could be said to result (also) from the negligence of an independent contractor in performing work on a part of the premises within its control.

The argument is based upon expressions in certain decisions by the intermediate courts: *Temple v. General Insurance Co.* 306 So.2d 915 (La.App.1st Cir. 1968); *Vinton Petroleum Co. v. L. Seiss Oil Syndicate*, 19 La.App. 179, 139 So. 543 (1st Cir. 1932). *Temple and Henson* dealt with the liability of the premise-owner for injuries to a construction employee resulting from the negligence of the independent contractor or his subcontractor employed to perform construction work, while *Vinton* by way of dicta indicated the owner might not have been liable if the person employed to dismantle a drilling rig (which fell and caused the damage) were an independent contractor instead of an employee of the owner.

As the Fifth Court noted, in certifying the present questions to us, the rationale in these decisions is unclear and, if interpreted as Shell desires, is inconsistent with other Louisiana jurisprudence imposing a non-delegable strict liability upon an owner under Article

2322 regardless of whether he retains control of his premises. *Olsen*, cited above at 561 F.2d 1190-94. To some extent, the uncertainty of rationale results from a failure to note that the strict liability under Article 2322 of the owner of a building for damages resulting from his non-delegable duty to keep it in repair, is based upon a totally distinct theory of liability than is that under Article 2320 of a master for the negligent torts of his servants.[18]

In *Camp v. Church Wardens*, 7 La.Ann. 321, 325 (1852), this court early recognized this distinction, in rejecting contentions similar to those now advanced by the defendant: "That these provisions [the provisions of Article 2302 (1825), the verbatim predecessor of Article 2322 (1870)] are entirely independent of the general rules concerning the responsibilities of masters and employers, and not in any manner connected with their relations, is shown conclusively by their place in the code. These articles are in the same chapter, and follow immediately that which provides for the latter, which is numbered 2299 [(1825), the verbatim predecessor of arti-

[18] The usual rule is that the vicarious tort liability of an employer-master for the torts of his employe-servant does not extend to liability for the torts of an independent contractor hired by the master. Prosser on Torts, Section 71 (4th ed. 1971). Nevertheless, even here tort doctrine recognizes that the master-employer may be liable for damage caused by his independent contractor in performing inherently dangerous duties, *Id.*, pp. 472-74, or a non-delegable duty owed by the master-employer to the plaintiff, *Id.*, pp. 470-72.

As the text of our opinion indicates, whatever the validity of these distinctions in determining tort liability under master-servant and independent contractor law, they play no function with regard to enforcing against a premise-owner the strict liability of Article 2322 for premise-defects, or of exculpating him from it.

cle 2320 (1870)]. They are evidently founded in an enlightened view of public necessity. They protect the neighbor; the passenger in the street; and it would be singular, indeed, if the men at work at the building were excluded from their just and salutary operation."

III. IS SHELL'S LIABILITY UNDER ARTICLE 2322 AFFECTED BY THE CIRCUMSTANCE THAT THE UNDERLYING SOIL UPON WHICH IT RESTS IS OWNED BY ANOTHER?

[13] In the context of our civil code, a building may be an immovable separate and distinct from the land upon which it is situated, when it is owned separately from the ownership of the land. Article 464 (1870); see 1978 re-enactment of Article 464 expressly so providing, and its Official Revision Comment (b) citing jurisprudence interpreting to this effect the former version of the article. See also Yiannopoulos, Civil Law of Property, Section 46 (Louisiana Civil Law Treatise, Volume 2; 1966).

We are cited to no persuasive authority or functional reason by which the owner of a building would be exculpated from his liability under Article 2322 for premise-defects in his building, simply because the soil upon which it is situated is owned by another.

Conclusion

Accordingly, we answer the certified questions (see footnotes 3 and 4) as follows:

Question 1: Yes.

Question 2: Not necessary to answer, in view of our previous answer. See also footnote 15 above.

Question 3: Yes.

Question 4: Yes.

Question 5: Yes.

Pursuant to Rule 12, Section 8, Supreme Court of Louisiana (1973), the judgment rendered by this court upon the questions certified shall be sent by the clerk of this court under its seal to the United States Court of Appeals for the Fifth Circuit and to the parties.

CERTIFIED QUESTIONS ANSWERED.

DIXON, J., concurs with reasons.

SANDERS, C. J., dissents and assigns written reasons.

MARCUS, J., dissents and assigns reasons.

SUMMERS, J., dissents.

APPENDIX 1

As set forth in the opinion of the Fifth Circuit, the full facts are, 561 F.2d 1178, at 1180-81:

> On May 6, 1970, a hot water heater explosion occured aboard a fixed platform owned by Shell Oil Company in the Gulf of Mexico off the coast of Louisiana. The platform was designated as Shell's "C" platform, and drilling was being conducted from the platform by a drilling contractor known as Movible Offshore, Inc. (Movible). The individual plaintiffs in this case are the

legal representatives of men killed in the explosion, except for Gordon Wallace who sues for personal injury. The plaintiffs were all employees of Movible.

To conduct the drilling operations from the platform, Movible had located its modular and movable drilling rig on the platform. The rig consisted of all equipment necessary to drill a well, including a derrick or mast, drawworks, the very large engines which were necessary to power the drilling equipment, and all normal appurtenances to a drilling operation. In addition, Movible had its modular living quarters on the Shell platform which provided a galley area for feeding the men, sleeping quarters, shower and bathroom facilities, and a lounge area. The living quarters unit was equipped with two electric water heaters. One water heater was located in the galley area, and another was located in the pantry area. These water heaters were Movible equipment and were wholly owned, as was the living quarters unit, by Movible. The modular living unit was fully movable, and when the rig was moved from one platform to another, it was picked up as a unit by a derrick barge and then transported to a new site and secured on a platform in such a way that cutting and burning of metal would be required to remove it.

Under the working arrangement in effect between Shell and Movible, two Movible drilling crews consisting of six men each worked opposite shifts so that the drilling rig could be kept in operation 24 hours a day. Shell performed none of the actual operations on the rig and had only one permanent representative there.

At the time Movible began drilling for Shell from Platform C or shortly thereafter, Movible took out liability insurance with Pacific Employers Insurance Company (Pacific), an affiliate of the Insurance Company of North America. In addition to providing liability insurance to Movible, Pacific agreed to provide a safety engineering and safety inspection service to Movible. This service was provided largely through one Gilbert Stansbury, a safety and technical representative of Pacific.

In connection with the safety engineering and technical service provided by Pacific, Mr. Stansbury was to visit the Movible rig on a quarterly basis. Mr. Stansbury first visited the rig on January 23, 1969, and then he did not revisit the rig until October 7, 1969. On his first visit, Stansbury inspected the water heaters in the company of Movible's toolpusher, a Mr. Desormeaux. At this time, he recommended (among other things) that a pressure-temperature relief valve be placed on the water heaters in question in place of the existing pressure relief valves. Movible failed to accrurately follow the recommendations of Mr. Stansbury, although they should have understood the recommendation since prior insurers had made the same or similar suggestions and Stansbury himself had made the same recommendation during inspections of other Movible rigs. Instead of ordering the proper type of "pressure-temperature" relief valve, Movible ordered and installed another pressure relief valve.

The valves were replaced on February 3, 1969. Mr. Desormeaux inspected the heaters after the installation of the valves and concluded that "everything looked okay." On October 7, 1969, Stansbury returned to the rig and interviewed another Movible toolpusher who had since replace Mr. Desormeaux. Mr. Stansbury did not make a visual inspection of the water heater but relied on the toolpusher's assurances that his recommendations had been followed. As a result, Stansbury reported that all his recommendations had been fulfilled.

On May 6, 1970, the hot water heater located in the pantry of the living quarters exploded resulting in many deaths and injuries. The trial judge found that the bottom of the hot water heater ruptured as a result of great pressure which build up in the tank. Then, the great explosive force was created when the water in the heater, which was "superheated" to a temperature of above its boiling point of 212°F., instantly "flashed" into steam when freed from the pressured confines of the tank and just as instantly expanded to more than 1,000 times its liquid volume.

The trial judge further found that the fact that an improper valve was in use on the heater was a proximate cause of the explosion. All the experts agreed that the pressure valve which Movible mistakenly placed on the hot water heater was not specifically designed for that use. While the exact cause of the explosion could not be conclusively determined, there is no doubt that had a working temperature pressure relief valve been in place, the accident would have been prevented. The recommended type of valve is

designed to relieve excess pressure and temperature, both of which contibuted to the explosion of the hot water heater.

DIXON, Justice (concurring).

I respectfully concur in the conclusion reached by Justice Tate, but would narrow one issue somewhat.

Ownership of the living unit attached to Shell's drilling platform is not the essential inquiry. We need only determine whether an owner of a building may allow another to make an attachment to the structure (from which attachment the owner intends profit to himself) and escape responsibility for the damage when the building is ruined by a malfunction in the attachment.

The public policy of this State, as embodied in C.C. 670, 2315 and 2322 requires the owner to answer in damages if he maintains his property in such a manner as to cause harm to others. *Klein v. Young*, 163 La. 59, 111 So. 495 (1927); *Camp v. Church Wardens of the Church of St. Louis*, 7 La. Ann. 321 (1852). Moreover, the owner cannot evade this responsibility through contractual arrangements, except with respect to the actual parties to the agreement. *Klein v. Young*, supra. (Although R.S. 9:3221 alows a deviation from this principle for leased premises, no lease is involved here).

The advantage to Shell from the attachment of the rig and living quarters is evident: unused drilling platforms return no profit. The responsibility for damage occasioned by the platform and its attachment is the converse of the advantages which accrue to Shell from owning the structure. See Starck, The Foundation of Delictual

Liability in Contemporary French Law, 48 Tul.L.Rev., 1043, 1055 (1974); Prosser, Law of Torts, § 69 (4th ed. 1971).

SANDERS, Chief Justice (dissenting).

I dissent for the reasons assigned by Mr. Justice Marcus.

MARCUS, Justice (dissenting).

While I agree with the majority opinion that Shell's platform is a "building" within the meaning of La.Civil Code art. 2322, I am unable to agree with the other conclusions reached by the majority.

A threshold requirement for the imposition of strict liability under article 2322 is that the building be owned by the party against whom liability is claimed. Our law recognizes that buildings or other constructions are separate immovables when they belong to a person other than the owner of the ground. La.Civil Code art. 464. Everything incorporated into a building or other construction becomes immovable without regard to ownership. *See* La.Civil Code art. 465, Comment (c).[1] There is,

[1] The Louisiana Civil Code of 1870 established three categories of immovables: immovables by nature, immovables by destination, and immovables by the object to which they are applied. La.Civil Code art. 463 (1870). Buildings and other constructions were thus classified as immovable by their nature. La.Civil Code art. 464 (1870). By amendment to the civil code, the various categories of immovables by nature have been eliminated and a single category of corporeal immovables has been substituted therefor. 1978 La.Acts 728. These amendments, however, have no effect upon the determination of ownership of a particular immovable.

however, a distinction between the classification of a building or other construction as an immovable and the determination of the ownership of that building or other construction. Ownership is the right by which a thing belongs to someone in particular, to the exclusion of all others. La.Civil Code art. 488. La.Civil Code art. 504 provides, as a general rule, "[a]ll that which becomes united to or incorporated with the property, belongs to the owner of such property, according to the rules hereafter established." The persumption of ownership contained in article 504 may, however, be rebutted by proof that a construction is owned separately from the soil or that any part of the building is owned separately from the rest of the building. *See* La.Civil Code art. 506. Such proof is undisputed in this case that Movible owned the living quarters module separately from Shell's ownership of the platform. Hence, pursuant to article 2322, Movible, as owner of the living quarters module, had the obligation to maintain or repair its building so as to avoid creation of risk of injury to others resulting from neglect to repair or vice in original construction. *See Loescher v. Parr*, 324 So.2d 441 (La.1975). By imposing this obligation on Shell, who had no ownership interest in the living quarters module, the effect of the majority opinion is to extend the strict liability concept of article 2322 to non-owners as well as owners of buildings in contravention of the intent and express language of article 2322.

Moreover, even assuming for the sake of argument the majority's erroneous characterization of Shell as the owner of the living quarters module, I would still be unable to agree with the majority's designation of the explosion of the water heater as a "ruin" of the building within the contemplation of article 2322. In *Davis v.*

Royal-Globe Insurance Cos., 257 La. 523, 242 So.2d 839 (1970), this court defined the meaning of the word "ruin" as used in article 2322:

> The 'ruin' contemplated by this Article has reference to the actual fall or collapse of a building or one of its components. This is the attitude in the French law . . . . And to satisfy the meaning of 'ruin' as used in Article 2322 the fall or collapse must involve a more or less substantial component of the structure. The English text of the Louisiana Code of 1808 translates *ruine* as 'falling down.' Comment, 42 Tul.L.Rev. 178, 184 (1967). Article 2322 is considered a reiteration of the principle that the building must 'fall' expressed in Article 670 of the Civil Code, except that it permits recovery by third persons lawfully on the premises, whereas Article 670 limits the owner's responsibility to neighbors and passers-by.

It is thus apparent that the explosion of a water heater is simply not a "ruin" of the living quarters module due to "neglect to repair" or "a vice in its original construction" under article 2322 and this court's jurisprudence interpreting this article.

In sum, it is my opinion that Shell was neither the owner of the living quarters module nor was the explosion of the water heater a "ruin" within the meaning of article 2322. Accordingly, article 2322 has no application in the determination of Shell's liability, if any, under the

facts presented.[1] I, therefore, respectfully dissent.

On Application For Rehearing

PER CURIAM.

We delete from our original opinion the phrase "by a drilling contractor which (as between itself and the platform owner) retained title to this appurtenant attachment", 365 So.2d 1291. This was unnecessary to our opinion, and the Fifth Circuit in *Moczygemba* did not consider the issue of ownership. Although that decision's published opinion does not so reflect, the defendant has called to our attention a pretrial order in the unpublished district court opinion which indicates that the quoted statement in our original opinion is incorrect.

With this correction, the defendant's application for rehearing is denied.

APPLICATION FOR REHEARING DENIED.

SUMMERS, C. J., and MARCUS, J., would grant.

BLANCHE, J., not participating.

[1] Having concluded that Shell is not liable pursuant to article 2322, I would find it unnecessary to consider whether the fault of a third person (Movible) relieves Shell of liability under article 2322 or whether liability under article 2322 is affected by the circumstance that the underlying soil upon which a building rests is owned by another. In addition, because the certification from the Fifth Circuit was limited to questions pertaining to Shell's liability under article 2322, it is unnecessary to consider Shell's liability, if any, under other articles of our code.

APPENDIX G

Mary OLSEN, PLaintiff-Appellant
Cross-Appellee,
v.
SHELL OIL COMPANY et al., Defendants-
Appellees Cross-Appellants,
v.
ARGONAUT INSURANCE COMPANY,
Intervenor-Appellant.
Christine W. CARVIN, Plaintiff-Appellant
Cross-Appellee,
v.
SHELL OIL COMPANY et al., Defendants-Third-Party
Plaintiffs Appellees-Cross-Appellants,
v.
TELEDYNE MOVIBLE OFFSHORE, INC., et al.,
Third-Party Defendants-Appellees Cross-Appellants,
Argonaut Insurance Company,
Intervenor-Appellant.
Frank Winston BOOKER et al.,
Plaintiffs-Appellees,
v.
SHELL OIL COMPANY et al.,
Defendants-Appellants.
Gordon Davis WALLACE, Plaintiff-Appellant
Cross-Appellee,
v.
SHELL OIL COMPANY et al., Defendants-Appellees
Cross-Appellants,
v.
ARGONAUT INSURANCE COMPANY,
Intervenor-Appellant.

ARGONAUT INSURANCE COMPANY,
Plaintiff-Appellant Cross-Appellee,
v.
SHELL OIL COMPANY et al.,
Defendants-Appellees.
No. 75-4019.
United States Court of Appeals,
Fifth Circuit.
May 25, 1979.

Action was brought to recover for injuries and death caused by explosion of water heater in drilling contractor's living quarters on drilling platform. The United States District Court for the Eastern District of Louisiana, at New Orleans, Frederick J. R. Heebe, Chief Judge, entered judgment in favor of platform owner, and appeal was taken. The Court of Appeals, 561 F.2d 1178, held that platform owner was not liable for breach of certain federal regulations but certified question of platform owner's liability under Louisiana law to the Louisiana Supreme Court, which held that platform owner was strictly liable. The District Court then granted indemnity to platform owner, held that drilling contractor was negligent, and concluded that to allow drilling contractor's insurer at time of explosion to intervene would serve no purpose, and appeals were taken. The Court of Appeals, Fay, Circuit Judge, held that: (1) trial court was correct in granting indemnity to platform owner; (2) evidence was sufficient to support findings that drilling contractor was negligent, that negligence was proximate cause of injuries, that hot water heater valve was not defective, and that insurance inspector was not negligent, but (3) in view of decision that platform owner was strictly liable, conclusion that to allow insurer at time of explosion to intervene would serve no purpose was incorrect.

Affirmed in part; reversed in part and remanded.

1. Indemnity 9(2)

Contract to indemnify and hold harmless, if applicable, includes payment of costs and attorney fees incurred by indemnity.

2. Workers' Compensation 2142, 2145

Although drilling contractor's exclusive liability to its employees was under the Longshoremen's and Harbor Workers' Compensation Act, and although contractor was not liable for injuries and death caused by explosion of water heater in living quarters on drilling platform for negligence because the Act destroys any underlying tort liability on the part of the employer, drilling platform owner was not barred from recovering from contractor under indemnity contract executed by both parties. Longshoremen's and Harbor Workers' Compensation Act, § 5, 33 U.S.C.A. § 905.

3. Indemnity 8(2)

Where intention of drilling platform owner and drilling contractor was clear on face of contract indemnifying owner for its liability arising from injury sustained due to negligence of contractor, and since no underlying public policy, statute or case law prevented owner and contractor from entering into indemnification contract, owner, which had been held strictly liable under Louisiana law for injuries and death caused by explosion of water heater in drilling contractor's living quarters on platform, was entitled to indemnity for damage caused as result of contractor's negligence. LSA—C.C. art. 2322.

4. Contracts 152

Court of Appeals has duty to interpret contract strictly and to accord words of contract their literal meaning.

5. Explosives 10

In suit against owner of drilling platform to recover for injuries and death caused by explosion of water heater in drilling contractor's living quarters on platform, there was sufficient expert testimony, indicating that had temperature pressure relief valve been in place, explosion probably would not have occurred, to support conclusion that drilling contractor was negligent.

6. Sales 441(1)

In suit to recover for injuries and death caused by explosion of water heater in drilling contractor's living quarters on drilling platform, in which drilling contractor sought indemnity from valve manufacturer under theory of implied warranty of fitness, evidence, from which trial court could have concluded that pressure relief system may have been blocked causing an explosion, was sufficient to support finding that relief valve may not have relieved pressure for reasons other than a defect in valve itself.

7. Negligence 134(2)

Although circumstantial evidence may be used by plaintiff to prove negligence, Louisiana law requires that plaintiff prove his case by fair preponderance of the evidence, such evidence being of a nature which excludes, with a reasonable amount of certainty, all other reasonable hypotheses.

8. Negligence 50

Whether or not insurer originally had duty to inspect drilling contractor's rig at time hot water heater relief valves in living quarters on drilling platform were changed, insurer was under no duty to reinspect premises, especially since it had been assured by drilling contractor employee, supposedly trained under extensive safety program, that its recommendations concerning change in type of relief valves had been carried out, and thus insurer could not be held liable for failure to visually reinspect rig for compliance with its recommendations.

9. Explosives 10

Evidence in action to recover for injuries and death caused by explosion of water heater in drilling contractor's living quarters on drilling platform was insufficient to connect either control or flange or heating element with explosion, and thus neither control nor flange manufacturer could be held liable on basis of their responsibility for or contribution to explosion.

10. Federal Civil Procedure 340

Where Louisiana Supreme Court had determined that drilling platform owner was strictly liable for injuries and death caused by explosion of water heater in drilling contractor's living quarters on platform, trial court's conclusion that intervention by insurer which covered drilling contractor at time of explosion would serve no purpose was incorrect since there was a defendant from which insurer could recover, and trial judge therefore should rule whether insurer could maintain suit based on decision that entry of formal award is not condition to such an insurer's right to maintain suit.

Wm. P. Rutledge, Lafayette, La., for Olsen, et al.

Joel L. Borrello, New Orleans, La., for Argonaut Ins. Co.

Donald A. Hoffman, New Orleans, La., for Pacific Employers Ins. Co.

John O. Charrier, Jr., New Orleans, La., for Shell Oil Co.

W. K. Christovich, Charles W. Schmidt, III, New Orleans, La., for Teledyne Movible.

Francis G. Weller, New Orleans, La., for Wiegand Co. & Thermo-Disc, Inc.

Patrick T. Caffery, W. Eugene Davis, New Iberia, La., for Texstream Corp.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG and FAY, Circuit Judges, and DUMBAULD*, District Judge.

FAY, Circuit Judge:

This controversy involves the explosion of an electric water heater situated in the living quarters of a drilling platform owned by Shell Oil Company (Shell). The drill-

*District Judge for the Western District of Pennsylvania, sitting by designation.

ing was being conducted from the platform by Movible Offshore Inc. (Movible) which had entered into a standard drilling contract with Shell. The insurance company for Movible until November, 1969 was Pacific Employers Insurance Company (Pacific), an affiliate of the Insurance Company of North America (INA). The policy of insurance issued by Pacific to Movible contained the following language with respect to safety inspections:

> The Company and any rating authority having jurisdiction by law shall each be permitted but not obligated to inspect at any reasonable time the work places, operations, machinery and equipment covered by this policy. Neither the right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking on behalf of or for the benefit of the insured or others, to determine or warrant that such work places, operations, machinery or equipment are safe.

Under Movible's own inspection, program daily inspections took place directed by the Movible toolpusher and weekly visitations to the rigs were made by Movible's Drilling Superintendent and his assistant. There were also daily safety meetings before each crew went to work and there were weekly safety meetings in which all men in the movable rig in the platform participated. Throughout the policy period with Pacific, Movible continued to perform safety inspections. INA also conducted periodic safety inspections of the rigs. On January 22-23 INA's inspector, Gilbert J. Stansbury, inspected the hot water heaters in the pantry and in the galley of the living quarters on the rig. Stansbury made

recommendations in writing to Carroll Desormeaux, the Movible toolpusher who accompanied him in the inspection. One of Stansbury's recommendations was that the fusible plug relief valves be changed to temperature pressure relief valves. Prior insurers had also made the same recommendation to Movible with respect to these valves. Instead of ordering pressure-temperature relief valves, however, Movible ordered and installed pressure relief valves. Toolpusher Carroll Desormeaux neglected to tell Movible's purchasing agent that the valves were to be placed on hot water heaters. On January 29, 1969, Movible placed an order with the area Texsteam distributor, Pneumatic Service and Equipment, Inc. for two ¾ inch, 5550 Texsteam relief valves set at 125 pounds. The valves were replaced on February 3, 1969 and on October 7, 1969 Stansbury returned to the rig and interviewed Desormeaux's replacement, Wyman Haas. In his deposition Stansbury stated that if Haas had verbally assured him that the proper valves had been installed, he would have taken Haas' word for it.

On November 1, 1969, INA lost the Teledyne account (which included Movible Offshore Inc.) to Argonaut which provided Movible's insurance at the time of the explosion on May 6, 1970. Argonaut intervened in all of these consolidated cases; it also filed a separate suit against the various defendants to recover the money paid on behalf of the injured parties.

In our previous opinion we held that Shell was not liable for breach of certain federal regulations issued by the Secretary of the Interior pursuant to the authority granted to the Secretary by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334 because the Act did not specifically provide a civil remedy for violations of the

statute or regulations and because we felt this was not the type of situation in which a cause of action should be implied or created.[1] We also concluded that in view of the fact that there was no clear precedent it was impossible to rule on the issue of Shell's liability under Louisiana Civil Code Art. 2322. Therefore, we certified the question to the Louisiana Supreme Court which held that Shell was strictly liable under Article 2322. *Olsen v. Shell Oil Co.*, 365 So.2d 1285 (La. 1977).

As far as the remaining issues we find that 1) the trial court was correct in granting indemnity to Shell; 2) the holding that Movible was negligent and that this negligence was the proximate cause of plaintiffs' injuries was not clearly erroneous; 3) the holding that the Tex-steam valve was not defective was not clearly erroneous; 4) there was sufficient evidence from which the trial judge could have determined that the INA inspector was not negligent; 5) in view of the decision by the Louisiana Supreme Court, the trial court's conclusion that to allow Argonaut to maintain its suit would serve no purpose was incorrect.[2]

I. Indemnity to Shell Oil Corporation

[1] See *Olsen et al. v. Shell Oil Company*, 561 F.2d 1178, 1181-1190 (5th Cir. 1977).

[2] The trial court stated:

> Subsequent to this Court's decision, the United States Court of Appeals for the Fifth Circuit held that entry of a formal award is not a condition of the carrier's right to maintain suit. *Louviere v. Shell Oil. Co.*, 509 F.2d 278 (5th Cir. 1975). That decision, of course, would govern the disposition of Argonaut's independent suit. However, in light of our present disposition of these consolidated cases, there is no defendant from whom Argonaut can recover its compensation payments, and its suit must, on that ground, be dismissed.

R. Vol. III at 926.

The trial court found that under an agreement between Shell and Movible the latter was obligated to indemnify Shell for negligence on its part causing liability to Shell.

[1, 2] A contract to indemnify and hold harmless, if applicable, includes payment of costs and attorney's fees incurred by the indemnitee (Shell). *See Loffland Bros. Co. v. Roberts*, 386 F.2d 540, 550-551 (5th Cir.1967). Movible (the indemnitor) argues, however, that no one can obtain indemnity from an employer for injuries or losses sustained by its employees because workmen's compensation is intended to be the exclusive liability of the employer. It is true that Movible's exclusive liability to its employees is under the Longshoremen's and Harbor Workers' compensation Act, 33 U.S.C. § 905. Although Movible is not liable to plaintiffs for negligence because Section 5 of the Act destroys any underlying tort liability on the part of the employer, *Robin v. Sun Oil Co.*, 548 F.2d 554, 556-(5th Cir. 1977), Shell is not barred from recovering under the indemnity contract executed by both parties.

In *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Service*, 377 F.2d 511 (5th Cir.) cert. denied, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967), this Court held that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 makes workmen's compensation benefits the exclusive liability of an employer to its employees or to anyone claiming under or through such employee. 377 F.2d at 514 *quoting Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, 129, 76 S.Ct. 232,

235, 100 L.Ed. 133 (1956).[3] This Court in *Berry Bros.* refused to extend the *Ryan* doctrine to the facts of that case where the injuries were sustained on a stationary offshore platform rather than a vessel.[4] Similarly, in the case before us the injuries occurred on a stationary offshore platform. This Court held in *Berry Bros.* that ODECO was not entitled to recovery under the warranty of workmanlike performance expounded by the *Ryan* case nor under maritime tort principles. 377 F.2d at 513. However, *Berry Bros.* specifically left open the possibility of a party contracting to indemnify another party.[5]

> Thus, while the employer may continue, even in spite of the exclusive liability provision of the Act, to remain liable for indemnity on the basis of an express or implied contractual obligation, in the absence of such obligation, as here, there simply exists no underlying tort liability upon which to base a claim for indemnity against the employer.

377 F.2d at 514-515. *See Cole v. Chevron Chemical Co. — Oronite Division*, 477 F.2d 361, 367-368 (5th Cir. 1973).

[3] The *Ryan* case permitted a vessel to recover damages for which it was liable to an injured worker where it could be shown that the stevedore breached an express or implied warranty of workmanlike performance. Since the legislature changed the liability from an absolute liability on the part of the vessel to a liability based on negligence the legislature felt it was no longer necessary to permit the vessel to collect against the employer or the stevedore. *See* Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, H.R. Rep. No. 1441, 92d Cong., 2nd Sess., *reprinted in* [1972] U.S. Code Cong. & Admin.News, pp. 4698, 4704.

[4] In the *Berry Bros.* case, Ocean Drilling and Exploration Co. (ODECO) sought indemnity from Berry Bros. Oilfield Service (Berry Bros.) for injuries sustained by employees of Berry Bros. in the course of performing repairs on a stationary offshore platform owned by ODECO.

[5] The indemnity agreement between Shell and Movible reads as follows:

[3] No underlying public policy, no statute and no case law prevents two parties such as Shell and Movible from entering into a contract to indemnify the owner of the platform (Shell) for its liability arising from injuries sustained due to the negligence of the contractor-employer (Movible). The trial court was correct in finding that the contract required Movible to indemnify Shell for attorney's fees and costs. Since the trial court found no liability on Shell's part, it was not necessary for it to go any further on the issue of indemnity. The extent of indemnity for the damages which Shell must now assume by being strictly liable will need to be reconsidered by the trial court. Our holding on this issue is restricted solely to the finding that the intention of the parties is clear on the face of the document and that Shell is entitled to indemnify for the damages caused as a result of Movible's negligence.

II. Negligence of Movible

[4] It is our duty to interpret contracts strictly and to accord the words of a contract their literal meaning. 548 F.2d at 557. The unambiguous terms of the indemnity contract provide that Shell is entitled to be made whole for any liability incurred through Movible's negligence. Consequently, if there had been no negligence on the part of Movible, Shell would not be entitled to indemni-

In the performance of the operations hereunder, contractor is an independent contractor, Shell, being interested only in the results obtained. Contractor agrees to protect, indemnify and save Shell, and where the operations are rendered in a joint operation, such other parties in the joint operation with Shell, harmless from and against all claims, demands and causes of action of every kind and character, arising in favor of third parties on account of personal injuries and/or deaths or damages to property occuring, in anywise incident to, in connection with, or arising out of, contractor's negligence in performing the operations under this contract.

ty. The trial court found that Movible's negligence was the proximate cause of the injuries to plaintiffs. The trial court stated:

> The fact that the temperature pressure relief valve, recommended by INA's safety inspector, was not placed on the hot water heater, was due solely to the negligence of Movible's employees. . . . Movible makes no claim that it disagreed with INA's recommendations and reasonably felt that a pressure relief valve was sufficient for the task. Instead, through its own carelessness, it simply failed to obtain the very type of valve which it intended to purchase.
>
> Further, the fact that an improper valve was in use on the heater was a proximate cause of the explosion.

R. Vo. III at 925.

[5] The record reveals that there was sufficient expert testimony from which the trial court could have concluded that Movible was negligent. The expert testimony indicated that had the temperature pressure relief valve been in place, the explosion probably would not have occurred.[6]

Fed.R.Civ.P. 52(a) provides that findings of fact will not be disturbed unless they are clearly erroneous and due regard will be given to the opportunity of the trial judge to observe and determine the witnesses' credibility. Finding sufficient basis in the record for the trial court's determination, we must uphold that determination.

6. See Appendix A, *infra*.

III. Liability of Texsteam

[6] Movible argues that it is entitled to indemnity from Texsteam under the theory of implied warranty of fitness, *Weber v. Fidelity & Casualty Co.*, 259 La. 599, 250 So.2d 754 (1971) and under general tort theory, *Appalachian Corp. v. Brooklyn Cooperage Co.*, 151 La. 41, 91 So. 539 (1952). With respect to the defectiveness of the Texsteam valve the district court stated:

> The evidence in this case certainly preponderates that this explosion could not have occurred had the Texsteam 5550 pressure relief valve properly relieved the pressure in the heater tank at 125 lbs. There is, however, no direct evidence that the valve was defective, and the Court is convinced that the circumstantial evidence in the case leaves open the reasonable possibility that the valve may not have relieved the pressure for reasons other than a defect in the valve itself.

R. Vol. III at 825.

[7] There is sufficient evidence in the record by the experts from which the trial court could have concluded that the pressure relief system may have been blocked causing an explosion. Although circumstantial evidence may be used by the plaintiffs to prove negligence, Louisiana law requires that the plaintiff prove his case by a fair preponderance of the evidence — such evidence being of a nature which excludes, with a reasonable amount of certainty, all other reasonable hypotheses. *Hargis v. Travelers Indemnity Co.*, 248 So.2d 613, 615 (La.App. 3rd Cir. 1971). The expert testimony indicated

that there were several ways a blockage could have been formed resulting in an explosion. If there was such a blockage of the pressure relief system, the explosion could have been the result of the blockage rather than a defect in the pressure valve. Thus, the findings of the trial court are supported by the evidence and are not clearly erroneous.

IV. Negligence of Pacific Employees Insurance Corporation

[8] The trial court found that INA had undertaken to inspect Movible's rigs on a periodic basis and to transmit its recommendations to Movible regarding the correction of any unsafe equipment or practice which it found.

This Court has stated that an insurer may, by the manner of conduct of safety inspections, or its representations concerning safety inspections create a serious risk to others if the employer relies on the insurer. *Stacy v. Aetna Casualty and Surety Co.*, 484 F.2d 289, 295 (5th Cir. 1973). In *Stacy* we said that an insurer may be liable if the employer so relied on the insurer's inspections that it neglected its own safety inspection program to its detriment. *Id.* We held in *Stacy*, however, that:

> [R]eliance will not be assumed merely from the existence of a permissive inspection clause in an insurance policy. The insurer's liability must rest upon proof of actual reliance by the insured on the contractual undertaking or on the subsequent representations by the insurer which resulted in acts or omissions by the insured.

484 F.2d at 295 (citations omitted).

We need not determine whether the trial judge properly concluded that a cause of action for negligent inspection exists under Louisiana law.[7] Whether or not INA originally had the duty to inspect, it is clear that INA was under no duty to reinspect the premises especially if it was assured by a Movible employee, supposedly trained under an extensive safety program, that the recommendations had been carried out.

The trial court was correct in reversing itself in its amended judgment and finding that INA was under no duty to visually reinspect Movible's rigs for compliance with INA's recommendations.

V. Liability of Therm-O-Disc and Wiegand

[9] We agree with the trial court that there was not sufficient proof to connect either the Therm-O-Disc control nor the Wiegand flange or heating element with the explosion. There is no evidence to support a finding that either Therm-O-Disc or Wiegand were responsible for or contributed to the explosion.

VI. Argonaut Insurance Company Intervention

[10] The trial court originally decided that Argonaut Insurance Company's independent suit against the defendants to recover compensation payments made to parties other than plaintiffs in this case should be dismissed because those payments were not made pursuant to a formal award. However, in an amended judgment the trial court recognized that subsequent to its

[7] The trial judge concluded that "although Louisiana law is not settled on the issue of whether its tort law permits a Workmen's Compensation Carrier to be sued for negligent inspection" the better view would be that an action for negligent inspection is proper when not prohibited by the compensation statute involved. R.Vol. III at 919.

decision this Court in *Louviere v. Shell Oil Co.*, 509 F.2d 278 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078, 96 S.Ct. 867, 47 L.Ed.2d 90 (1976), held that entry of a formal award is not a condition to the carrier's right to maintain a suit. Although admitting that *Louviere* would govern the disposition of Argonaut's suit, the trial court held that because there was no defendant from which Argonaut could recover the suit would have to be dismissed.* Due to the liability of Shell Oil, this finding by the trial court must be reversed and remanded so that the trial judge can rule according to *Louviere*.

Conclusion.

For the above stated reasons the findings of the district court are affirmed in part, reversed in part and the case is remanded for disposition in accordance with this opinion.

AFFIRMED In Part; REVERSED In Part and REMANDED.

* See n. 21, *supra*.

APPENDIX

The following are excerpts of expert testimony regarding the explosion:

Q And if it had a discharge line from the valve on it, the only water, hot water, that could get in that line is just the water relieved?

A The valve opening, that's correct.

Q Would that not indicate to you, Mr. Flettrich, that there probably was nothing wrong with that valve, at least, one time while it actually was put into operation?

A That is certainly a possibility.

Q Did you see anything about the appearance of that valve that indicated any kind of defect or problem in the valve itself?

A No, sir. Of course, it was damaged, and damaged in the accident.

Q Mr. Flettrich, I show you a valve which has been assumed to have been on the failed heater, and I ask you to examine the top of the seat of the valve?

A Somebody wedged it, and I opened it myself. You've got a strong —

Q Mr. Flettrich, the part of the valve we are looking at now is above the point where the seat opened, and the valve relieved, is that correct?

A That's correct.

Q And if we could get the jammed part open, that would be the section or the part that would —

A Well, the seat is actually between the threaded section and the knurled section. I've examined it before.

Q Can you see what appears to be a scale buildup on top of that seat?

A Yes, there is some indication of a scale there.

Q Is there anyway that scale could get there, Mr. Flettrich, other than the valve opening and letting water in this part of the valve so as to form a scale?

A That is on the top or discharge side, so it would have to get water up there in order to do that.

Q That would indicate also, would it not, sir, that the valve had relieved while in operation?

A At sometime, yes.

Q And would you expect to get this much scale on just a single relief? Would that not indicate relief fairly continuously and over some —

A Over some period of time, that's correct.

Q It would indicate opening of the valve over a fairly extended period of time, would it not?

A That is correct.

Q Mr. Flettrich, you indicated in answer to Mr. Weller's question that water hammer as a possibility of explanation for this accident was somewhat remote. Wouldn't you say that the occurence of this accident itself is very remote?

A Well, water heater explosions are happening all over the country all of the time, and we have been fortunate in this area not to have them in that degree. They are rather remote.

Q Mr. Flettrich, aren't there a number of explanations for failure of a relief system other than defect in the valve itself?

A Certainly.

Q And one example of that is blockage of the piping?

A Yes.

Q Can you give the Court any other example of failure of a relief system other than the defect in the valve itself?

A Right off I can't think of any unless you take in the operator's practice of, if a relief valve pops off, often they tie the handle down. There is no indication that was the case here, in other words, the human element that gets involved in all of this.

Q For example, if one put a cup, for example, over the handle of that valve, that would impinge the handle, and the valve could not open, is that correct?

A That is correct.

Q You design heating systems as part of your business?

A Yes.

Q In connection with designing a heater system, is it necessary for you to be familiar with the Louisiana Plumbing Code?

A Yes. All the plumbing codes had very little to say about hot water installation, but that is true.

Q Are you familiar with the provisions in the Louisiana Plumbing Code which provides, in effect, that it is necessary to have either a temperature pressure relief valve on the hot water heater, or a separate temperature valve and separate pressure valve?

A Yes.

Q That is contained in the Louisiana Plumbing Code, is it not?

A Yes.

Q How long, if you know, has that provision been a part of the Louisiana Plumbing Code?

A I have no idea how long it has been there. It is accepted practice that a water heater should have temperature, pressure protection.

MR. CHRISTOVICH:

We object because there is no showing that Louisiana Plumbing Code is applicable to this particular installation, this particular locale. I would think that counsel will have a right to cross on that point, but I merely make that objection.

THE COURT:

Your objection is noted.

BY MR. DAVIS:

Q How long were you aware of the fact that the Louisiana Plumbing Code has this provision in it?

A Oh, perhaps 20 years, maybe. I don't really know, but it was in the code, I know — the practice, let me put it that way, and there is a lot of things that engineers do, and, I might add, that I do things quite often in the interest of safety that are not in the code.

I don't really know the answer to your question, but I can tell you we have been aware of this for over 20 years.

Q Mr. Flettrich, I show you a copy of the plumbing code entitled "Sanitary Code, State of Louisiana, Chapter 10-A, Plumbing," and I will ask you to refer to Section 13 — excuse me, page, and Paragraph 8.13.2.

MR. CHRISTOVICH:

Can I see that just a minute?

MR. DAVIS:

It is attached to my pretrial order.

BY MR. DAVIS:

Q Would you read that paragraph to the Court?

A Certainly.

"8.13.2: Temperature relief valves. Temperature relief valves shall be installed for all equipment used for heating or storage of hot water. Each valve shall be rated as to its B.T.U. capacity at 210 degrees Fahrenheit. It shall be capable of discharging sufficient hot water to prevent any further rise in temperature."

Q Do you know if there is any prohibition in the code against reducing the outlet size of the relief valve.

A I am not sure if it is in there, but it is in codes. It is not accepted practice to reduce the outlet.

Q You wouldn't be surprised if it was in the code?

A I wouldn't be a bit surprised.

Q You would never permit your men to reduce the size of the discharge outline on it?

A We have chastized a few.

Q Isn't it correct, sir, that if a discharge line is reduced, and reduced or restricted, that this can severely impair the discharge capability of a valve?

A Yes, sir.

Q In other words, you could get a situation where the discharge line is so reduced that the valve cannot discharge whatever it is relieving fast enough to prevent a buildup?

A It has two effects: One is the fact, that is, the restriction of flow, and the other is that the increase on the discharge pressure, the relief valve operates on pressure differentials, and if you increase the pressure on the discharge line, you increase the pressure at which it discharges on the inlet side.

Q Under your theory of this accident, Mr. Flettrich, what temperature do you think the water reached just before the accident?

A I have no idea except that it had to be over 212, if the tank took off.

Q If the water was say 225 degrees, under 30 pounds of pressure in the tank, and this relief valve relieved, that is, the valve would be relieving, and when the valve opened, it would be water on the outside?

A It would steam. It would flash, that's correct.

Q And steam has a considerably greater volume than water?

A Very, very much so.

Q Wouldn't this make the restriction of the outlet line a much more serious problem where your relieving water then flashes into steam?

A Yes, it would . . .

* * *

BY MR. DAVIS:

Q Mr. Flettrich, if you were selling valves for hot water heaters and someone came to you and asked you for a valve to go on a hot water heater, what type of valve would you give the customer?

MR. CHRISTOVICH:

Objection. The gentleman isn't a salesman; he is an engineer.

THE COURT:

That is why he saif "if."

The objection is overruled. You may answer.

THE WITNESS:

Of course, I would give him a temperature pressure, designed for a hot water heater.

MR. DAVIS:

Thank you very much.

* * *

Q Is it a fact, sir, that it is your opinion and it has been your opinion, and is today, that this explosion could not have occurred without the failure, for whatever cause, of the pressure relief valve?

A That is correct.

Q Is it also a fact that you have narrowed that failure down pretty much to a question of either it failed by virtue of some defect within the valve, or because there was some blockage of the system, therefore restricting the valve from operating?

A I suppose that would be so, sticking valve, or blockage.

Q Suppose that you had a failure simply by what you call a water hammer, with just normally heated water, that is, not super-heated water, or take just cold water, and you had a failure by water hammer, then what type of failure would you have? And will you describe it.

A I'm not sure what type of failure we would have, since water hammer is something that I haven't seen, frankly, ever. I haven't seen any destruction — I have read reports, and so forth. So I'm really not qualified to answer that question. I think that water hammer just to do that much damage is a rare happening.

Q Now, suppose that there was not superheated water in this tank, and you only had a hydrostatic pressure to cause the tank to fail; do you think you would have gotten this type of explosion?

A You would have had no explosion whatsoever. There is no stored energy in water at normal temperatures, and the tank would just simply leak, and that is all. Water would not have flashed into steam at normal temperatures, below 212.

Q In other words it was a superheated water that in effect, caused the general catastrophe, is that correct?

A Superheated water, I think, is the cause of the destruction —

Q Yes.

A — and I think the initial failure was the tank rupture.

Q Yes.

A But you have to have the two in order to get the end result.

Q And, among other things, the pop-off valve or relief valve, that was put on there to relieve pressure from superheated water, is that not correct?

A To relieve pressure from normal thermal expansion, superheated or through a normal range.

We've used the term "superheated," here, and it is not a technically correct term. I think we're talking about water over 212, so you don't superheat the water — you superheat the steam.

MR. RUTLEDGE:

Thank you.

I believe that is all.

* * *

Q Let me ask you about a pressure temperature valve.

What else do you get when you put on a pressure temperature valve that you don't get when you have just a pressure valve?

A You've got a safeguard against elevated temperatures. Those are set at 210 degrees to relieve whenever the water temperature gets over 210.

Q I went and looked in my shed this morning and it says 210 degrees or 120 p.s.i., and is that what you mean?

A That is about what you get, or what it provides.

Q Is that a heat rating or a B.T.U. rating?

A Yes.

Q What is that?

A The B.T.U. rating is, the valve is rated two ways: One on the pressure, steam basis, which is ASME, and the other is the water rating, which is for the temperature relief device; and, the idea being that they want the temperature relief device to relieve fast enough to keep the temperature from rising in the tank.

Q If we had had a pressure temperature valve on this heater, am I correct that what you are saying is that the temperature got to a certain point, and if it was at 210 it would have relieved at 210?

A That is correct.

Q And what would that have done insofar as preventing this explosion?

A Cold water comes in, and we immediately start the water temperature to failing.

Q It lets cold water in.

In your opinion, would that have prevented this casualty from occurring if they'd had it?

A If enough cold water would have come in to the heater at that temperature within the tank, and, of course, if the valve was relieving, the tank wouldn't have ruptured.

Q Regardless of what kind of valve you had on there, if it had relieved at the rated pressure —

A You would have not ruptured the tank.

Q So if you had had a temperature pressure relief valve on there, you would have had an additional safeguard, is that correct?

A A safeguard, and if it had been working properly, then the water temperature would not have gone above 212.

Q And you couldn't have gotten to the pressure that you were talking about?

A Well, as long as it was relieving.

Q And with only the pressure valve that we have, the valve that was on the system, that type of valve, is it not possible that you could have gotten a situation where the scale could have completely plugged up either the inlet to the valve or the outlet to the valve?

A Certainly.

Q And prevented this thing from operating?

A Certainly.

Q It is also possible that you could have gotten scaling entirely in the valve, so as to prevent the seat from working?

A Certainly.

Q So, scaling is one thing that could have caused it?

A Yes.

Q And if you had a temperature valve would scaling have made any difference?

A Well, depending on the construction of the valve. If the scale would affect the pressure side of a temperature pressure releif valve, it would certainly affect the pressure and temperature equally.

Those valves are constructed differently; the guides with this lower guide are more effective than one with the guide above.

Q The type of valve that you have here is such a thing as a bottom guide?

A Yes.

Q When do you use a bottom guided valve? And when don't you use a bottom guided valve?

A Well, generally, bottom guided valves are not used for water service.

Q And this is a bottom guided valve?

A Yes.

Q You said that a bottom guided valve is not used for water service?

A For water service.

Q And this is a bottom guided valve?

A Yes, sir.

Q Was this valve — this valve was supposedly for water service? Or what service?

A I have no idea. I have no information on it.

Q Well, the way the valve was situated on the hot water heater, if the valve relieved, would it be relieving water or steam or air, or what?

A It depends on the situation. As long as the water in the tank was still in the liquid state, which is usually the case, it would initially relieve as water.

And if it was superheated, say above 212, it would relieve steam the minute it hit atmospheric conditions.

Q What I'm trying to find out is, if that is a bottom guided valve, why don't you use a bottom guided valve?

A Merely to prevent against sticking on the guide due to scaling.

Q Due to scaling? And this is a bottom guided valve, so am I correct that you don't think, or am I correct that this is not the right valve for that application?

A Well, the ASME code says that bottom guided valves should not be used for water service.

Q Just by looking at the valve externally, could you tell whether it was one or the other?

A Well, I can tell by looking in it, not mounted on the tank. You mean on the tank?

Q Yes?

A No, sir.

Q You would have to take out the valve?

A I would look it up in the literature and tell.

Q You would look at a picture, but not externally while —

A Right.

Q In view of the conditions which you have heard existed here, the operating conditions, would a pressure temperature valve have been preferable to the valve that we have there?

A From all good practice, yes. In my opinion it would have been much better, yes.

Q It would have worked regardless of scale?

A Oh, no. They can scale also.

Q So scale could have caused it to —

A It could; yes. But a valve built for water would not be as subject to binding as one not built for water.

Q So that is a question of degree?

A Yes.

Q So is it a fair statement that regardless of what kind of valve we put on there, it is subject to scaling in the operation?

A Pressure temperature valves have test levers also for that very purpose, to keep them free.

Q Now, the test lever, is this something based on your experience in the industry? We've got a hot water — let's say that we've got a hot water heater setting out here in the living quarters, in the living module, galley, or pantry that you had on there at the platform, and is there some maintenance program? What would you do for maintenance on this heater?

Is there something that everyday you should go look at it? Every week? Every month? Or is it every six months, or every year?

A A thing like this, there should be a schedule set up, about once a month.

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NO. 83-828

In the Supreme Court of the United States

OCTOBER TERM, 1983

SHELL OIL COMPANY,

Petitioner,

V.

MARY OLSEN, ARGONAUT INSURANCE COMPANY, CHRISTINE W. CARVIN, and GORDON DAVIS WALLACE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOL. II — APPENDIX H — K

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APPENDIX "H"

Mary OLSEN, Etc., Christine W. Carvin, Etc., Gordon Davis Wallace and Argonaut Insurance Company,

Plaintiffs-Appellees,

v.

SHELL OIL COMPANY,

Defendant-Appellant-Appellee,

v.

TELEDYNE MOVIBLE OFFSHORE,

Defendant-Appellant.

No. 82-3363.

United States Court of Appeals,
Fifth Circuit.

July 5, 1983.

Action was brought to recover for injuries and death caused by explosion of water heater in living quarters on offshore drilling platform. After remand, 595 F.2d 1099, the United States District Court for the Eastern District of Louisiana, Frederick J.R. Heebe, Chief Judge, entered judgment adopting and modifying a special master's recommendations and awarding damages to widows of deceased employees, injured employee, and contractor's insurer as against owner of platform and contractor. Platform owner and contractor appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1)

Longshoremen's and Harbor Workers' Compensation Act was no bar to recovery by insurer from owner, who was strictly liable under applicable state law, of amount greater than what victims or their representatives were entitled to recover as matter of state tort law; (2) Louisiana law on inflationary factors in damages awards was properly applied; (3) award of prejudgment interest was proper; (4) district court did not make erroneous awards to widow both for loss of love and affection and for grief and anguish; and (5) death of one of six beneficiaries of one of deceased employees just prior to judgment did not require recalculation of damages.

Affirmed.

John O. Charrier, Jr., Robert T. Lemon, II, New Orleans, La., for defendant-appellant-appellee.

W.K. Christovich, New Orleans, La., for Teledyne, Pacific & Movible.

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Appeals from the United States District Court for the Eastern District of Louisiana.

Before GEE, REAVLEY and HIGGINBOTHAM, Circuit Judges:

PATRICK E. HIGGINBOTHAM, Circuit Judge:

On May 6, 1970, a hot water heater exploded aboard a fixed drilling platform in the Gulf of Mexico, killing three workers and injuring six. There followed these cases, which are now appearing before us for the third time. *See Olsen v. Shell Oil co.*, 561 F.2d 1178 (5th Cir.1977) (*Olsen I*); *Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir.1979) (*Olsen II*). Following the remand in *Olsen II*, the district court entered a judgment adopting and modifying a special master's recommendations and awarding damages to plaintiffs Mary Olsen, Christine Carvin, Gordon Wallace, and Argonaut Insurance Co. Defendant Shell Oil Co. and third-party defendant Teledyne Movible Offshore now appeal. Concluding that none of their challenges to the district court's award of damages has merit, we affirm the carefully considered judgment below.

Facts and Procedural History

The facts are ably summarized in Judge Fay's earlier opinion. *Olsen I*, 561 F.2d at 1180-81. We repeat here only for the context of these appeals.

Shell Oil Co. owned the drilling platform fixed ninety miles off the coast of Louisiana. At the time of the accident a contractor, Teledyne Movible Offshore, was drilling from the platform. Movible Offshore had installed a movable drilling rig on the platform and modular living quarters for its employees. The living quarters, which included bathroom and galley facilities, were equipped with two electric hot water heaters.

The explosion, on May 6, 1970, of one of the hot water heaters caused the deaths and injuries to Movible Offshore's employees. It was later discovered that an unsuitable valve in the water heater had allowed pressure to

build up, causing the explosion. An insurance company inspector had recommended one type of valve, but Movible Offshore had ordered and installed another.

Because the accident occurred on a fixed platform in the Gulf of Mexico, the provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, govern. The OCSLA provides that with respect to the disability or death of an employee engaged in natural resource mining or exploration activity on the outer Continental Shelf, compensation shall be payable under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, 43 U.S.C. § 1333(b).[1] After the accident, Movible Offshore's insurer, Argonaut Insurance Co., paid benefits to the personal representatives and injured survivors under the LHWCA. Because the LHWCA limits the employer's liability to compensation or benefits under the Act, 33 U.S.C. § 933(i), the search then began for a more accessible purse.

The first three suits were brought by Mary Olsen and Christine Carvin, two widows, and by Gordon Wallace, an injured employee. Defendants included Shell, manufacturers and sellers of the hot water heater and some of its components, and the builder of the living quarters. Argonaut Insurance Co. intervened in all three suits and also filed its own suit in an effort to recover amounts paid and to be paid in compensation to other employees or their representatives. In all four suits Shell filed a third-party complaint against Movible Offshore for indemnity.

After exhaustive proceedings, the trial judge entered his opinion with respect to liability in these consolidated

[1] Before 1978, the provision in question was §1333(c).

cases. He acquitted all parties of negligence except Movible Offshore. He also rejected the two theories of strict liability asserted against Shell. A judgment in favor of all defendants followed.

On appeal, we affirmed the district court's ruling that plaintiffs had no right to recover from Shell for violations of certain regulations issued by the Secretary of the Interior pursuant to the authority granted to him by OCSLA, because the OCSLA provided neither an express nor an implied right of action. *Olsen I*, 561 F.2d at 1181-1190. Plaintiffs' second theory of strict liability was based on Article 2322 of the Louisiana Civil Code, which provides:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is a result of a vice in its original construction.

In the absence of a controlling precedent of the Louisiana Supreme Court, we were unable to decide whether Shell could be held liable under Article 2322. We therefore certified the question to the Louisiana Supreme Court. *Olsen I*, 561 F.2d at 1194, which held that Shell was strictly liable. *Olsen v. Shell Oil Co.*, 365 So.2d 1285 (La.1977).

After the cases had been returned to us, we resolved the remaining issues on appeal. *Olsen II*, 595 F.2d 1099. We upheld the trial judge's determination that Movible Offshore was contractually bound to indemnify Shell for any liability incurred through Movible's negligence. *Id.* at 1103-1104. We affirmed the finding that Movible had been negligent. *Id.* at 1104. And we affirmed the trial judge's exoneration of the manufacturer of the valve that was

installed, the insurance company whose inspector had recommended the valve that was not installed, and the manufacturers of certain other components of the water heater. *Id.* at 1104-1105. Finally, we held that Argonaut Insurance Co. had a right to proceed against Shell although no formal compensation award had been entered. *Id.* at 1105-1106.

On remand the damage issues were tried to a magistrate acting as special master. *See* Fed.R.Civ.P. 53. He entered proposed findings and recommendations. The district court then filed an opinion adopting the findings and recommendations with certain modifications. It entered judgment as follows:

> 1. Shell was ordered to pay $771,487.67 to Carvin, $16,000 to Olsen, and $88,092.02 to Wallace, of which awards Argonaut was to receive $39,674.72, $16,000, and $8,750.91 respectively;
>
> 2. Shell was ordered to pay Argonaut a sum equal to the compensation benefits and medical expenses it had paid on account of the deaths and injuries of the other Movible Offshore employees;
>
> 3. Shell was ordered to assume payment of any compensation benefits and medical expenses that Argonaut would have to pay in the future;
>
> 4. Movible Offshore was ordered to indemnify Shell for all the above amounts, and for its attorneys' fees and costs of defense.

In addition, the district court ordered prejudgment interest to be paid on the awards to all plaintiffs. This appeal by Shell and Movible Offshore followed.

The OCSLA

We preface our review of error claimed by Shell and Movible with a reference to the underlying substantive law. The OCSLA provides:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary ..., the civil and criminal laws of each adjacent State ... are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf ...

43 U.S.C. § 1333(a)(2)(A).

The OCSLA, as the Supreme Court made clear in *Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969), "deliberately eschewed the application of admiralty principles to these novel structures" and instead applied "federal law, supplemented by state law of the adjacent State, ... to these artificial islands as though they were federal enclaves in an upland State." *Id.* at 355, 89 S.Ct. at 1837. The Court continued:

> Since federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, the Act supplemented gaps in the federal law with state law through the 'adoption of State law as the law of tahe United States.' Under § 4, the adjacent State's laws were made 'the law of the United States for [the relevant subsoil and

> seabed] and artificial islands and fixed structures erected thereon,' but only to 'the extent that they are applicable and not inconsistent with ... other federal laws.'

Id. at 357, 89 S.Ct. at 1838. In *Rodrigue*, the Court held that the Louisiana wrongful death statute, not the Death on the High Sea Act, furnished the remedy for two tortious deaths occurring on fixed offshore oil rigs.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the Court developed the teaching of *Rodrigue*, holding that the Louisiana statute of limitations governed personal injury actions under the OCSLA that were based on Louisiana law: "Congress made clear provision for filling the the 'gaps' in federal law; it did not intend that federal courts fill in those 'gaps' themselves by creating new federal common law." *Id.* 404 U.S. at 104, 92 S.Ct. at 354. The Court added:

> If Congress' goal was to provide a comprehensive and familiar body of law, it would defeat that goal to apply only certain aspects of a state personal injury remedy in federal court. A state time limitation is coordinated with the substance of the remedy and is no less applicable under the Lands Act.

Id. at 103, 89 S.Ct. at 353.

The implication of *Rodrigue* and *Huson* is that whenever an action is based on "surrogate" Louisiana law,[2]

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[2] We borrow the term from Judge Brown's opinion in *Law v. Sea Drilling Corp.*, 510 F.2d 242, 244 (5th Cir.1975). The law governing *all* OCSLA cases is of course federal; the question is whether state law has been *incorporated* as federal law.

as are the claims of Olsen, Carvin, and Wallace, Louisiana law provides all aspects of the remedy. More problematical is the task of classifying the independent action brought by Argonaut. In one sense, Argonaut's claim against Shell is derived from Louisiana law, in that Argonaut seeks to hold Shell liable for violating Article 2322. In another sense, Argonaut is proceeding under federal law, because its *federal* obligation to pay compensation benefits to the victims of their survivors is a necessary element of its claim against Shell. Not surprisingly, we are not the first to confront this puzzlement. Another panel in a separate case from this same explosion has concluded that Argonaut's claim against Shell is for "unjust enrichment" under Louisiana law as incorporated into federal law by the OSCLA, rather than a strictly federal claim.

Raymond Louviere, a victim, filed suit in 1973 against the same array of defendants now before us. On defendants' plea of prescription, alleging that Louviere's claim for personal injuries was barred because the one-year prescriptive period for tort actions in Louisiana had passed, the district court dismissed the suit.

We reversed and remanded. The issue on appeal was whether Argonaut's independent action seeking reimbursement for compensation benefits (the fourth case involved in *this* appeal) interrupted the period of prescription. Defendants argued that it did not, because it " 'does not state any right or cause of action whatsoever.' " *Louviere v. Shell Oil Co.*, 509 F.2d 278, 281 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078, 96 S.Ct. 867, 47 L.Ed.2d 90 (1976) (quoting *Callender v. Merks*, 185 La. 948, 171 So. 86, 87 (La. 1936)). We disagreed, holding first that § 33 of the LHWCA, 33 U.S.C. § 933, does not provide the sole remedy of an employer or its insurer against third persons, 509 F.2d at

282-284, and second that Argonaut's complaint alleged facts sufficient to support a claim under the *Louisiana* law of unjust enrichment. *Id.* at 284-285. Thus, *Louviere* stands for the proposition that surrogate Louisiana law, not federal law, provides the basis for Argonaut's recovery of compensation benefits and medical expenses from Shell. We turn now to the error claimed by Shell and Movible Offshore.

Recovery in Excess of Tort Damages

Shell and Movible Offshore contend that the district court erred in awarding as damages an amount in excess of their maximum exposure in direct tort liability to Olsen, Carvin, Wallace and the other employees or their representatives. The district court in fact ordered Shell to compensate Argonaut for all amounts it had paid out in LHWCA benefits. According to Shell and Movible Offshore, the LHWCA contemplates one damage award against a culpable third person and limits that award to the amount the employee or his representative would be entitled to recover under applicable tort law. The district court's damage award to Argonaut, they contend, violated this principle of the LHWCA.

As a gloss on the language of § 33 of the LHWCA, this argument is not without force. Section 33(b) provides that acceptance of compensation under an award shall operate as an assignment to the employer of the employee's rights of action against third persons. Section 33(e) sets forth how "[a]ny amount recovered by such employer on account of such assignment" shall be distributed. Shell and Movible Offshore argue that these subsections by implication limit an employer or insurer's potential recovery against third persons on account of a compensation award

to the amount it could recover by assignment.

Contrary to Argonaut's suggestion, we do not believe that *Louviere v. Shell Oil Co.*, 509 F.2d 278 (5th Cir.1975), has fully resolved this issue against Shell and Movible Offshore. In *Louviere*, we held only that § 33 was not the exclusive remedy of an employer or insurer against a third person. *Id.* at 282-84. Specifically, we held that Argonaut could sue Shell and the other defendants even though no formal compensation award had been entered and it was not a statutory assignee. *See also Pallas Shipping Agency, Ltd. v. Duris*, __ U.S. __, __, 103 S.Ct. 1991, 1996, 75 L.Ed.2d __ (1983). We did not decide, however, whether Argonaut could recover an amount *in excess* of the potential tort recovery of the victims or their survivors.

Shell and Movible Offshore's argument is, however, foreclosed by the Supreme Court's decision in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 385 (1969). There the Court held that a stevedore that had paid compensation benefits to a widow under the LHWCA was not limited by the Act to recovering from the shipowner the amount recoverable by the widow in a direct action against the shipowner. The situation in *Burnside*, as the Court explained, was as follows:

> Normally the stevedoring contractor is content with its remedy of subrogation to the rights of the deceased longshoreman's representative against whatever third party may be liable for the death, usually the shipowner. In this case, however, the applicable Illinois Wrongful Death Act limited the amount recoverable by by the decedent's representative to $30,000, far short of Marine Terminals' potential liability of $70,000.

Id. at 410, 89 S.Ct. at 1148. The Court concluded, "[W]e can perceive no reason why Congress would have intended so to curtail the stevedoring contractor's rights against the shipowner." *Id.* at 413, 89 S.Ct. at 1149.[3] Argonaut's situation is comparable.[4] It has sought to recover from Shell an amount greater than what the victims or their representatives are entitled to recover as a matter of state tort law. Bound by the Supreme Court's decision in *Burnside*, we hold that the LHWCA is no bar. *See also Pallas Shipping Agency, Ltd. v. Duris*, 51 U.S.L.W. at 4583.

Shell and Movible Offshore identify only one arguably apposite case. In *Hinson v. SS Paros*, 461 F.Supp. 219 (S.D.Tex.1978), where a longshoreman fell to his death as a result of negligence on the part of the shipowners, the court denied the insurer recovery of the total projected compensation benefits and limited recovery to the damages for which the shipowners would be liable to the employer's family in an action brought by them. Because the longshoreman was sixty-six years old at the time of his death, the expected compensation benefits far exceeded the wrongful death recovery, as in *Burnside* and the present case. 461 F.Supp. at 222-223. The court reasoned that the 1972 amendments to the LHWCA, in particular the addition of § 905(b), "modified *Burnside* to the extent that employers or their compensation insurance carriers are

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[3] In *Burnside* the Court indicated that the stevedore's right of indemnity, if available, would be under federal maritime law. 394 U.S. at 416-417, 420 n. 23, 89 S.Ct. at 1151-1153 n. 23. In the context of the OCSLA, we recognized that the insurer's remedy was under surrogate state law. *Louviere*, 509 F.2d at 284-285.

[4] The district court awarded Mary Olsen only $16,000 because she had been divorced from the decedent at the time of the accident and he had been providing little support or comfort to his former family. Argonaut's compensation obligation to the Olsen family was much greater than this amount.

limited to the recovery of compensation benefits paid, as provided in § 933, and that in no instance can they recover more than the injured worker or his beneficiaries." *Id.* at 223. The pertinent part of § 905(b) reads as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title.... The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness oor a breach thereof at the time the injury occurred. *The remedy provided in this subsection shall be exclusive of all other remedies against the vessel* except remedies available under this chapter.

33 U.S.C. § 905(b) (emphasis added). In *Hinson* the court interpreted § 905(b) not only as abolishing the *Sieracki* action for breach of warranty of seaworthiness, but also as limiting the vessel's liability to the amount that could be recovered in an action under § 933.

Whatever its meaning, however, § 905(b) only applies to *vessels*. It does not limit the liability of other "third persons" who were never bound by the *Sieracki* doctrine to begin with. Shell's fixed oil drilling platform, like the helicopter in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337, 341 n. 5 (5th Cir.1982), simply is not a "vessel" within the meaning of the LHWCA. *See Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1348 (5th Cir.1980); *Callahan v. Fluor Ocean Services, Inc.*, 482 F.2d 1350, 1351 (5th Cir.1973). The 1972 LHWCA amendments thus cannot affect the availability of a recovery in excess of tort

damages against Shell.[5]

Inflation

Movible Offshore argues that the district court erred in following the Louisiana law on inflationary factors in damage awards, *see Edwards v. Sims*, 294 So.2d 611, 617 (La.App.1974); *Murphy v. Georgia-Pacific Corp.*, 628 F.2d 862, 869 (5th Cir.1980) (diversity case applying Louisiana law), rather than "federal" law. As noted above, the claims of Olsen, Carvin, Wallace, and Argonaut derive from *Louisiana* law. *Huson* teaches that when a state remedy is applicable through the OCSLA, all aspects of that remedy are applicable, except for "mere 'housekeeping rules.' " 404 U.S. at 103 n. 6, 92 S.Ct. at 354 n. 6. "The federal borrowing of state law under the Lands Act is all-inclusive ..." *Bonner v. Chevron U.S.A.*, 668 F.2d 817, 819 (5th Cir.1982).

We have not yet decided the precise issue of whether the state law on inflation governs in an OCSLA action based on surrogate state law. Yet in *Evans v. Chevron Oil Co.*, 438 F.Supp. 1097, 1104 (E.D.La.1977), *aff'd without opinion*, 616 F.2d 565, 566 (5th Cir.1980), the district court, citing *Rodrigue*, employed the Louisiana rule, which allows the decreasing purchasing power of the dollar due to inflation to be considered, in making an OCSLA damage award.

On the other hand, in the recent case of *Gulf Offshore*

[5] In a somewhat related and spirited argument, Shell also contends that the district court erred in requiring it to assume Argonaut's future compensation liabilities. We disagree. Contrary to Shell's protestations, the district court's order does not force it "to enter the business of an American casualty insurance company." Shell can pay a lump sum, which is what it wants to do, to a carrier in return for its assumption of the obligation to issue the weekly compensation checks. The district court's order was a pragmatic gesture to judicial economy.

Co. v. Mobile Oil Corp., 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981), the Supreme Court was confronted with the somewhat analogous question of whether *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), the federal rule requiring FELA juries to be instructed on the nontaxability of personal injury awards, applies to an OCSLA personal injury action based on Louisiana law. Instead of deciding this question, the Supreme Court remanded the case to the Texas Court of Civil Appeals for a determination of what the Louisiana rule was, and (assuming an inconsistency between the two) to decide "whether *Liepelt* displaces the state rule in an OCSLA case." *Id.* 453 U.S. at 488, 101 S.Ct. at 2880. That the Supreme Court would remand rather than answering the question itself suggests that the answer was less than self-evident.

On remand, 628 S.W.2d 171 (Tex.Civ.App.—Houston 1982, writ ref. n.r.e.), *cert. denied*, __ U.S. __, 103 S.Ct. 259, 74 L.Ed.2d 202 (1982), the Texas Court of Civil Appeals held that state law, although inconsistent with federal law, had to be followed:

> In the instant case OCSLA has borrowed a remedy provided by the state law of Louisiana: a cause of action for damages for personal injuries. We think that when OCSLA borrowed the remedy, it borrowed the remedy in its entirety. In other words, OCSLA made the entire state cause of action *applicable* federal law, enforceable as federal law. This conclusion leads to our holding that OCSLA has borrowed from the law of Louisiana and has made applicable federal law in this case the Louisiana law which makes discretionary the giving of a jury instruction that damage awards are not subject to income taxation.

Id. at 174 (emphasis in original).

We think the Texas Court of Civil Appeals reached the result required by *Rodrigue* and *Huson*. Likewise, we believe that *Rodrigue* and *Huson* dictate that the state rule on inflation be followed here. Pretending that inflation does not exist only disconnects the law from reality. Enough fairy tales float into trials without our adding a judicial spook. But our view of the wisdom of a rule is not here the index of its application. That we view the rule as integral to a tort system is important, however. Accounting for inflation has a direct and appreciable impact on the dollar amount of a plaintiff's recovery; far from being a mere "housekeeping rule," it is at least as much an aspect of the state remedy as the state statute of limitations. Indeed, the Supreme Court's quotation in *Huson* from a leading case on the *Erie* doctrine points toward choice of law principles analogous to those prevailing in diversity cases, even though the Court cautioned in the preceding footnote that "[t]his is not to imply that a federal court adjudicating a claim under state law as absorbed in the Lands Act must function as it would in a diversity case." 404 U.S. at 103 n. 5 & n. 6, 92 S.Ct. at 353 n. 5. Further, to the extent OCSLA cases travel parallel to the more frequently trod paths of diversity cases, courts and counsel may with greater sureness engage in the task of predicting the choice of law. Finally, observing the essentially unitary character of these state and federal remedies enhances the probability of each system's achieving its risk-distributive goals.

Prejudgment Interest

Both Shell and Movible Offshore contend that the district court should not have awarded prejudgment interest, citing *Berry v. Sladco, Inc.*, 495 F.2d 523 (5th

Cir.1974); *Aymond v. Texaco, Inc.*, 554 F.2d 206 (5th Cir.1977), and *Musial v. A & A Boats, Inc.*, 696 F.2d 1149 (5th Cir.1983). Plaintiffs meanwhile argue that such an award is expressly permitted by *Ellis v. Chevron U.S.A., Inc.*, 650 F.2d 94 (5th Cir.1981). We have the task of seeking common ground for these cases.

In *Berry*, a personal injury action under the OCSLA, we upheld a district court's denial of prejudgment interest:

> The tenets of *Rodrigue* make firm the conclusion that 28 U.S.C. § 1961 controls the applicable time period for determining interest in this case. Section 1961 provides in relevant part that, 'interest *shall* be calculated from the date of the entry of the judgment, at the rate allowed by State law.' (emphasis added) This is a positive statement of federal law, obligatory in its terms, and as such is controlling in an action brought under the Lands Act.

495 F.2d at 528. In *Aymond* we followed *Berry* in affirming a denial of prejudgment interest, noting that "this action was in federal court under the Lands Act, not the diversity statute, in a manner indistinguishable from the *Berry* action, and, as in *Berry*, there are no gaps in the federal law on computation of interest to be filled by the Louisiana interest statute." 554 F.2d at 212. Recently, in *Musial*, we applied both *Berry* and *Aymond* in holding that an OCSLA plaintiff's claim for prejudgment interest on his LHWCA award had been properly rejected by the district court:

> An award of interest in a suit brought under OCSLA is governed by federal law. *See Berry v. Sladco, Inc.*, 495 F.2d 523, 528 (5th Cir.1974). Hence, pursuant to 28 U.S.C. § 1961 'such interest shall be calculated from the date of entry of

the judgment, at the rate allowed by state law.' *Aymond v. Texaco, Inc.*, 554 F.2d 206, 211 (5th Cir.1977). The trial court's award of interest is, therefore, affirmed.

Id. 696 F.2d at 1154.

By contrast, in *Ellis*, an OCSLA wrongful death case, we upheld a denial of prejudgment interest once again, but only on the ground that the district court had "properly exercised its discretion." 650 F.2d at 98. The panel there read 28 U.S.C. § 1961 as mandating postjudgment interest but also permitting prejudgment interest. Thus, it concluded that the district court "could have left intact its award of prejudgment interest if it found 'other principles of law' which justified the award ..." *Id.* (quoting *Illinois Central Railroad Co. v. Texas Eastern Transmission Corp.*, 551 F.2d 943, 944 (5th Cir.1977)).

We think *Ellis* is the better view. *Ellis* reads the federal interest statute as permissive on the matter of prejudgment interest; *Berry* and *Aymond* read it as prohibitory. The problem with the latter reading is that 28 U.S.C. § 1961 governs all civil actions in federal district courts, *Gele v. Wilson*, 616 F.2d 146, 148 (5th Cir.1980), except diversity cases, *Degelos Bros. Grain Corp. v. Fireman's Fund Insurance Co. of Texas*, 498 F.2d 1238, 1239 (5th Cir.1974), yet prejudgment interest has frequently been awarded in nondiversity cases without express statutory authority (for example, suits in the admiralty). Indeed, *Berry* and *Aymond* appear to contravene the almost universal view that "Section 1961 does not by its silence bar the awarding of prejudgment interest ..." *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 989 (6th Cir.1982) (citing cases).

Ellis indicated that an award of prejudgment interest in an OCSLA case might be justified by "other principles of law." We think the Louisiana statute providing for interest from the date of judicial demand, La.Rev.Stat. § 13:4203, is such a principle. Accordingly, we hold that where, as here, a district court awards prejudgment interest to a prevailing OCSLA plaintiff whose remedy is based on surrogate state law, the award should not be disturbed on appeal if supported by that state law.

This holding, we believe, is consistent with the precepts of *Rodrigue* and *Huson*. Prejudgment interest, and inflationary measures, ought to be regarded as integral to each other and to the state law remedy, particularly when the final judgment is being entered, as it is here, more than a decade after the suits were originally filed. *See General Motors Corp. v. Devex Corp.*, __ U.S. __, __ n. 10, 103 S.Ct. 2058, 2062-2063, 75 L.Ed.2d __ (1983).[6]

Recovery for Loss of Love and Affection and for Grief and Anguish

Shell and Movible Offshore also maintain that the district court erred in making awards to Christine Carvin

[6] Our choice between the *Berry-Aymond-Musial* line of cases and the *Ellis* case could be argued to be a choice between two sets of dicta. That construction is in our view strained. We prefer to address head on the fact that we have conflicting cases and to state candidly that we have chosen the *Ellis* case.

It has been suggested, in dictum, that a panel faced with conflicting panel decisions must follow "the longer established and more extensive line of precedent." *Washington v. Watkins*, 655 F.2d 1346, 1354 (5th Cir.1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). If this rule were applied here, we would note that the *Berry-Aymond-Ellis* line of cases contravenes an earlier holding that 28 U.S.C. § 1961 does not address prejudgment interest. *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966).

both for loss of love and affection and for grief and anguish. In *Croce v. Bromley Corp.*, 623 F.2d 1084, 1094-1095 (5th Cir.1980), *cert. denied*, 450 U.S. 981, 101 S.Ct. 1516, 67 L.Ed.2d 816 (1981), we held that Louisiana law does not permit plaintiffs in a wrongful death action to recover "*separate* monetary awards for loss of love and affection on the one hand and for sorrow and mental anguish on the other" (emphasis in original).

The question here is the separateness of the awards. The special master recommended an award of $290,000 for "loss of love and affection" and an award of $90,000 for "grief and anguish." The trial judge acknowledged that these duplicative awards for a single category of loss constituted error under Louisiana law. However, he concluded that when they were viewed as a single award for loss of society, the $380,000 total was not "clearly erroneous." He therefore approved the entire damage amount.

The district court explained that it was "willing to look beyond the labels the master has placed on the awards herein disputed ..." Its intent was clearly to combine the two sums and treat them as its single award for loss of society. We cannot say this sum was excessive. We find no error.

Death of Cynthia Carvin

Finally, Movible Offshore argues that the death of Cynthia Carvin just prior to judgement should have been taken into account in calculating the damages for her father's wrongful death. Assuming that this point was preserved, we nonetheless reject Movible Offshore's claim of error. In *Wakefield v. Government Employees Ins. Co.*, 253 So.2d 667 (La.App.1971), *writ denied*, 255 So.2d 771

(La.1972), the court reasoned:

> If the beneficiary has died by the time that the court assesses damages, certainly that fact must be considered in the assessment, because loss of support and other damages can then be actually (rather than fictionally) measured.

Id. at 671. In the present case, however, Cynthia Carvin had reached the age of majority at the time of her death, which occurred twelve years after the accident. Given this fact, and the fact that Cynthia Carvin was only one of six beneficiaries (the others were her four siblings and her mother), any reduction in the district court's damage award would have been minimal. We do not believe the Louisiana Supreme Court would require recomputation of a wrongful death recovery under these circumstances. Here time would feed upon time if we were to find that because we have taken so long that we must take even longer. Somewhere in that process we will have lost sight of the idea that no decision is a decision, if in the past thirteen years we have not done so already.[7]

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[7] Two additional arguments have been raised on appeal by Movible Offshore. Movible contends that the district court erred in ordering it to indemnify Shell not only for the judgment against it but also for its attorneys' fees. In *Olsen II*, however, we held, "The trial court was correct in finding that the contract required Movible to indemnify Shell for attorney's fees and costs." 595 F.2d at 1104. Thus, Movible's appeal of this point challenges the law of the case. We decline to reconsider our prior holding.

Movible also argues that a waiver of subrogation in its drilling contract with Shell prohibits Argonaut from recovering from Shell. The problems with this argument are threefold. For one thing, this contention does not appear to have been presented below. Moreover, a waiver in Movible's contract with Shell would not bind Argonaut, a nonparty. Finally, in *Louviere* this court recognized that Argonaut's right to recovery was based on unjust enrichment, not contractual subrogation. 509 F.2d at 284-85.

Lest our silence be taken as expression of other than frustration we pause to note the consumption of thirteen years to decide these cases, to date. It is not a pleasing story for counsel, court, or the Congress. This is too long for widows and children. Without attempting to assess blame for all the systemic cracks into which these cases fell, the snail's pace was not fair. At some point it ceases to be justice.

In sum, we agree with the district court's interpretations of the Longshoremen's and Harbor Workers' Compensation Acat, the Outer Continental Shelf Lands Act, and Louisiana law. We affirm the judgment below, and with the hope that these cases will now be ending their thirteen-year odyssey.

AFFIRMED.

APPENDIX "I"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Minute Entry
April 21, 1982
Heebe, J.

MARY OLSEN
AS ADMINISTRATRIX OF THE
SUCCESSION OF KENNETH MAHANEY, etc., et al. — CIVIL ACTION

NO. 70-1240

versus

SECTION B

SHELL OIL COMPANY, et al

CHRISTINE W. CARVIN,
ADMINISTRATRIX OF THE ESTATE OF, AND WIDOW OF HER LATE HUSBAND JOSEPH R. CARVIN, SR., etc., et al. — CIVIL ACTION

NO. 70-2986

SECTION B

versus

SHELL OIL COMPANY, et al.

FRANK WINSTON BOOKER and MRS. MINNIE LEONARD BOOKER, HIS WIFE — CIVIL ACTION

NO. 71-894

versus

SECTION B

SHELL OIL COMPANY, et al

GORDON DAVIS WALLACE — CIVIL ACTION

versus

NO. 71-1144

SHELL OIL COMPANY, et al. SECTION B

ARGONAUT
INSURANCE COMPANY CIVIL ACTION

versus NO. 71-1265

SHELL OIL COMPANY, et al. SECTION B

(CONSOLIDATED CASES)

These consolidated actions arose under the Outer Continental Shelf Lands Act (hereinafter OCSLA). Presently before the Court are the Findings and Recommendation of the Special Master, appointed to determine the issue of damages. Teledyne Movible Offshore, Inc., Shell Oil Company, and Argonaut Insurance Company have made objections to the master's findings and recommendation pursuant to Rule 53(e)(2), Federal Rules of Civil Procedure.

Teledyne contends the master was in error in the following respects:

1) by allowing prejudgment interest on the claims made to the Carvin and Olsen plaintiffs;

2) by considering the effects of future inflationary trends in assessing damages;

3) by granting separate awards to the Carvin family for loss of love and affection and for grief and anguish and in addition, by granting awards in these areas which are excessive; and

4) by basing his computation of the loss of support to the Carvin family on the late Mr. Carvin's gross wages.

Shell joins in the first two of Teledyne's objections. Shell also makes the following objections:

1) that the discount rate used by the mster, 7.75%, was too low;

2) that Shell should not be required to reimburse Argonaut for compensation benefits Argonaut has paid; and

3) that Shell should not be required to assume Argonaut's future compensation liabilities.

Argonaut, the compensation carrier in these consolidated cases, makes three objections. They are:

1) the master did not recognize or discuss the claims of Argonaut Insurance Company presented in Civil Action No. 71-1265 as it relates to claims other than those of Olsen and Carvin;

2) the findings and recommendations make no provisions for compensation paid by Argonaut subsequent to the date of the stipulation or for future compensation obligations of Argonaut Insurance Company; and

3) Argonaut was not awarded prejudgment interest.

When reviewing objections to the master's factual findings, this Court must accept those findings unless they are "clearly erroneous." Rule 53(e)(2), *supra*. *See* Livas v. Teledyne Movible Offshore, Inc., 607 F.2d 118 (5th Cir. 1979). The clearly erroneous standard is the same one applied by an appellate court when reviewing objections to findings of fact of a district court. N.L.R.B. v. Sequoia

District Council of Carpenters, 568 F.2d 628 (9th Cir. 1977). Therefore, the master's factual findings "come here well-armed with the buckler and shield," Horton v. United States Steel Corp., 286 F.2d 710, 713 (5th Cir. 1961), and the party objecting to them must bear the burden of proving they are "clearly erroneous." N.L.R.B. v. Crockett-Bradly, Inc., 598 F.2d 971 (5th Cir. 1979).

I

Defendants Teledyne and Shell object to the master's award of prejudgment interest to wrongful death plaintiffs Carvin and Mahaney. Their contention is based on an interpretation of 28 U.S.C. § 1961[1] which would preclude an award of interest prior to entry of judgment. Arguing that § 1961 is inconsistent with the Louisiana Rule which would require the award of prejudgment interest,[2] Teledyne and Shell assert the federal statute must displace the inconsistent state law. *See* 43 U.S.C. § 1333(a)(2).

We cannot accept defendant's interpretation of 28 U.S.C. § 1961. The statute does not address the issue of prejudgment interest. It was enacted to insure that interest would be paid from the date of entry of judgment

---

[1] Section 1961 of 28 U.S.C. reads, in pertinent part, as follows:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court....Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

[2] L.S.A.-R.S. 12:4203 reads as follows:

> Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, "ex delicto," which may be rendered by any of the courts.

and not to preclude interest prior to that time. Illinois Central Railroad Co. v. Texas Eastern Transmission Corp., 551 F.2d 943 (5th Cir. 1977), *and* Louisiana and Arkansas Railway Co. v. Export Drum Co., 359 F.2d 311 (5th Cir. 1966).

Briefs submitted by defendants make it clear that the view this Court takes is not universally accepted. *See* Aymond v. Texaco, Inc., 554 F.2d 206 (5th Cir. 1977), *and* Berry v. Sladco, Inc., 495 F.2d 523 (5th Cir. 1974). In *Aymond* and *Berry*, the Fifth Circuit affirmed the trial court's denial of prejudgment interest. The opinions also contain dicta to the effect that prejudgment interest may not be awarded in an OCSLA case. However, in Ellis v. Chevron U.S.A., Inc., 650 F.2d 94 (5th Cir. 1981), the court rejected dicta in *Aymond* and *Berry*. *Ellis* reasoned that the sole purpose of § 1961 was to provide post-judgement interest. The court then went on to find that since there was no preclusion to an award of prejudgment interest under federal law, the award of such interest in an OCSLA case was within the discretion of the trial court. In light of prior interpretations of 28 U.S.C. § 1961, *see Illinois Central Railroad Co. and Louisiana and Arkansas railway Co., supra*, *Ellis* would seem to be a better reasoned opinion than *Aymond* and *Berry*, and this Court will follow the *Ellis* decision.

The master felt he was precluded by *Aymond* and *Berry* from awarding prejudgment interest to Gordon Wallace, the personal injury plaintiff. He also felt he was compelled, under L.S.A.-R.S. 13:4203 *and* Louisiana Civil Code Article 2924, to award prejudgment interest to the wrongful death plaintiffs. However, in light of the *Ellis* decision,[3] the master was neither precluded from nor

[3] *Ellis* was handed down after the magistrate issued his Findings and Recommendation.

required to award prejudgment interest to any of the plaintiffs. For that reason, this Court rejects the master's determination on those issues and will determine for itself whether the award of prejudgment interest would be proper in the instant case.

These consolidated cases have been filed approximately eleven years ago. During that time there have been many delays caused by appeals, certification to the Louisiana Supreme Court, numerous unique issues of law, etc., but the inordinate delays incurred herein are in no way attributable to the plaintiffs. During this same period of time, Shell has had the use of this money when interest rates have greatly exceeded the legal rate applicable herein. Under the circumstances, discretion and wisdom would dictate that an award of prejudgment interest is necessary in order to fully compensate the claimants and to make them whole. Sea Land Services, Inc. v. Eagle Terminal Tankers, Inc., 443 F.Supp. 532 (D.D.C. 1977).

II

Teledyne and Shell contend that under Johnson v. Penrod Drilling Co., 510 F.2d 234 (5th Cir. 1975), the master erred when he considered inflationary factors in determining the amount of damages recoverable in the instant litigation. Although *Penrod* reflects the use of inflationary factors, it is not applicable here. "[F]or federal law to oust adopted state law, federal law must first apply." Rodrigue v. Aetna Casualty Co., 395 U.S. 352 (1965), at page 359. After making this statement, *Rodrigue* went on to hold that Louisiana's wrongful death statute controlled the litigation involved in that case because federal admiralty law was not applicable to actions arising on fixed platforms within the area of the Outer Continental Shelf.

In addition, Johnson v. Penrod Drilling Co., *supra*, was a Jones Act case and is not applicable to this litigation which arose out of an accident on a fixed structure within the area of the Outer Continental Shelf. There being no applicable federal law on the issue of inflation, *Rodrigue* mandates that this Court look to Louisiana law which allows consideration of inflationary factors. *See* Morgan v. Liberty Mutual Ins. Co., 323 So.2d 855 (La.App. 4th Cir. 1975), *and* Evans v. Chevron Oil Co., 438 F.Supp. 1097 (E.D.La. 1977), *aff'd* 616 F.2d 565 (5th Cir. 1980). Therefore, we conclude the master was correct in considering the effects of inflationary factors in determining the award of damages.

III

Teledyne makes two objections to the master's awards to the Carvin family for loss of love and affection and for grief and anguish. It contends the two elements may not form the basis of two separate awards and that the awards are excessive. Under Louisiana law, the master erred by allowing separate awards to the Carvin family for loss of love and affection and for grief and anguish. Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir. 1980). However, the Court's inquiry cannot stop there. Even though separate awards were not appropriate, loss of love and affection and grief are component parts of the broader category of damages known as "loss of society," which is recoverable under Louisiana law, *see* Croce, *supra*, and this Court will not overturn the award just because it was mislabeled.

Since the Court is willing to look beyond the labels the master has placed on the awards herein disputed, the only issue is whether or not the awards were excessive for the loss of society suffered by the Carvins. The question

presented by this issue is not whether this Court would have made the same award but whether the award made by the master was "clearly erroneous." Rule 53(e)(2), *supra*. In light of the close relationship that "existed between Mr. Carvin and each member of the household," master's Findings and Recommendation, at page 13, this Court cannot say that an award of $380,000 for loss of society to the Carvin family is "clearly erroneous." Accordingly, the master's determination herein is accepted by this Court.

IV

In addition to the foregoing objections, Teledyne objects to the master's determination of the loss of support to the Carvin family. This objection is based on the contention that the master relied on the gross wages of the late Mr. Carvin in determining the amount of loss of support. *See* Norfolk Western Railway v. Liepelt, 444 U.S. 490 (1980). Although, at one point in his findings of fact, the master refers to the decedent's gross wages, he does not state, and this Court does not find, that his determination was based on gross wages. The master received evidence of Mr. Carvin's tax liabilities, Transcript of the Proceedings Before the Special Master, at pages 387-388, and this Court will not assume that he ignored those considerations. Accordingly, the master's determination of loss of support is accepted by this Court.

V

The master reduced the award of future loss of support to the Carvin family by 5.75%. He made this reduction in order to arrive at the present value of the award. Shell contends that in light of the presently available investment opportunities the discount rate should have been higher.

Under OCSLA, the master was required to apply Louisiana law when determining the amount of damages. Rodrigue v. Aetna Casualty Co., *supra.* Recent Louisiana jurisprudence provides ample support for the discount rate used by the master. *See* Cheathem v. City of New Orleans, 378 So.2d 369 (La. 1979); Hebert v. Diamond M Drilling Co., 385 So.2d 410 (La.App. 1st Cir. 1980); *and* Lalonde v. Weaver, 360 So.2d 542 (La.App. 4th Cir. 1978). In those cases, the Louisiana Supreme Court and Courts of Appeal relied upon a discount rate of 5%. In addition, as recently as 1980, the 5th Circuit in Evans v. Chevron, *supra,* approved an award which was based on a 6% discount rate. In light of the Louisiana jurisprudence and the *Evans* decision, we cannot say the master's use of a 5.75% discount rate was clearly erroneous.

VI

Shell objects to the recommendation by the master that it be required to reimburse Argonaut for the compensation benefits Argonaut has paid. This objection is based on Shell's contention that Argonaut is limited to its compensation lien against the awards made to the wrongful death and personal injury plaintiffs and that Shell may not be held liable for any amount which exceeds the amount awarded to those persons.

Shell's contention is only partially correct. The awards made to Christine Carvin, Mary Olsen, and Gordon Wallace are subject to a lien in favor of Argonaut for the compensation benefits it has paid. Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980). However, this lien is not Argonaut's sole source of reimbursement. In the event the awards to the compensation recipients are not sufficient to fully reimburse Argonaut, Shell must make up

the difference between those awards and the compensation benefits paid. This independent right of Argonaut to bring suit for compensation benefits it has paid due to deaths and injuries arising from the accident involved in the instant litigation has already been recognized by the Fifth Circuit. *See* Olsen v. Shell Oil Co., 595 F.2d 1099, 1105-6 (5th Cir. 1979), *and* Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975).

VII

Somewhat related to the preceding objection is Shell's objection to the master's recommendation that it be required to assume directly all of Argonaut's future compensation liabilities. Shell asserts that by accepting such a recommendation, this Court would "impose an infinite period for which defendants will be liable to pay damages." Shell claims infinite periods of liability are contrary to the established view of the courts that prospective damages should be limited to a definite term (*i.e.*, until maximum cure in the cse of a seaman receiving maintenance and cure).

Contrary to Shell's assertions, the master's recommendation would not impose an infinite period of liability on it. Argonaut's potential liability is limited to the amounts due the compensation claimants under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* The recommendations would only require that Shell assume this limited liability.

Since the Fifth Circuit and this Court have already determined that Argonaut has an independent right to seek reimbursement for the compensation benefits it has paid, the master's recommendation is in the best interest of

judicial economy without any detriment to the parties. If Shell were not required to assume directly the payment of these benefits, Argonaut would have to periodically return to this Court for a judgment requiring reimbursement of the benefits it pays in the future. In order to avoid this unnecessary judicial waste, this Court will accept the master's recommendation.

VIII

In its first objection, Argonaut contends the master erred by only recommending that Shell reimburse it for compensation benefits paid to the Olsen and Carvin plaintiffs. The Court agrees with Argonaut. Argonaut has an independent right of reimbursement and that right cannot be prejudiced by the failure of some of the compensation recipients to file suit. Louviere v. Shell, *supra*. Therefore, the master should have recognized Argonaut's right to receive reimbursement for the benefits it paid to all compensation claimants.

IX

Argonaut next objects because it contends there are no provisions in the master's recommendations for reimbursement of the benefits it has paid and will pay subsequent to the stipulation entered into by the parties. Notwithstanding Argonaut's contention to the contrary, the master recommends Argonaut be reimbursed for all compensation benefits it pays up to entry of judgment. Although this recommendation includes reimbursement for compensation benefits paid subsequent to the stipulation, we feel Argonaut should be allowed reimbursement for compensation benefits paid up to the time of payment of

this judgment.[4] Thereafter, Shell will directly assume payment of these benefits.

X

Argonaut's final objection is that the master erred in not awarding prejudgment interest to it. Howell v. Marmpegaso Compania Naviera, 578 F.2d 86 (5th Cir. 1978), made it clear that an award of prejudgment interest is within the discretion of the trial court. However, *Howell* went on to hold it was in error for the trial court to award prejudgment interest to plaintiffs and withhold such an award from the intervening compensation carrier. Accordingly, the master should have allowed prejudgment interest to Argonaut. Such interest shall be at the legal rate and shall run from the date of judicial demand on those compensation payments made prior to judicial demand, and as to those compensation payments made subsequent to judicial demand, legal interest shall apply from the date the compensation benefits are paid.

The Court, after carefully considering the record, the applicable law, the master's Findings and Recommendation, and the objections thereto, hereby approves and adopts the master's Findings and Recommendation insofar as they are not inconsistent with the foregoing.

Accordingly,

IT IS THE ORDER OF THE COURT that plaintiff Christine Carvin, individually and in her representative capacity, be, and she is hereby, AWARDED $771,487.67.

---

[4] Due to Argonaut's ongoing obligation and the possibility of appeal, the amount of reimbursement owed to Argonaut may change even after entry of this judgment.

IT IS THE FURTHER ORDER OF THE COURT that plaintiff Mary Olsen Haun, in her representative capacity, be, and she is hereby, AWARDED $16,000.00.

IT IS THE FURTHER ORDER OF THE COURT that plaintiff Gordon Davis Wallace, be, and he is hereby, AWARDED $88,092.02.

IT IS THE FURTHER ORDER OF THE COURT that Argonaut Insurance company, be, and the same is hereby, AWARDED the following amounts:

a) with respect to its claim for reimbursement of compensation and burial expenses resulting from the death of Joseph R. Carvin, Argonaut is to be AWARDED $39,674.72, being the amount paid by Argonaut as of December 17, 1979, and such other amounts of compensation which may have been paid by Argonaut to date of payment of judgment herein, with legal interest as provided in Section X of this opinion;

b) with respect to its claim for reimbursement of compensation and burial expenses resulting from the death of Kenneth E. Mahaney (Olsen), Argonaut is to be AWARDED $37,760.92, being the amount paid by Argonaut as of December 18, 1979, and such other amounts of compensation which may have been paid by Argonaut to date of payment of judgment herein, with legal interest as provided in Section X of this opinion;

c) with respect to its claim for reimbursement of amounts paid by Argonaut Insurance Company to the Special Fund resulting from the death of Robert L. Booker, Argonaut is to be AWARDED $1,000.00, with legal interest from the date of judicial demand;

d) with respect to its claim for reimbursement of compensation and medical expenses resulting from the injuries sustained by Raymond D. Louviere, Argonaut is to be AWARDED $69,302.12, being the amount paid by Argonaut as of December 12, 1979, and such other amounts of compensation and medical expenses which may have been paid by Argonaut to the date of payment of judgment herein, with legal interest as provided in Section X of this opinion;

e) with respect to its claim for reimbursement of amounts paid by Argonaut Insurance Company resulting from injuries sustained by George M. Parker, Argonaut is to be AWARDED $2,121.02, with legal interest as provided in Section X of this opinion;

f) with respect to its claim for reimbursement of compensation and medical expenses resulting from injuries sustained by Gordon D. Wallace, Argonaut is to be AWARDED $8,750.91, with legal interest as provided in Section X of this opinion;

g) with respect to its claim for reimbursement of compensation and medical expenses resulting from injuries sustained by Charles J. Martinez, Argonaut is to be AWARDED $62,752.74, of which $26,095.02 was paid in medical expenses through November 13, 1979, and compensation benefits in the amount of $36,757.72 to January 3, 1980, and such other amounts of compensatin and medical expenses which may have been paid by Argonaut to date of payment of judgment herein, with legal interest as provided in Section X of this opinion.

IT IS THE FURTHER ORDER OF THE COURT that with respect to amounts awarded Argonaut Insurance

Company by the judgment herein, resulting from the deaths of Joseph R. Carvin and Kenneth E. Mahaney (Olsen) and from injuries sustained by Gordon D. Wallace, such amounts are to be paid in preference and priority to and out of any amounts to which individual compensation beneficiaries may be entitled to under the judgment herein, provided the remainder of any amount which individual compensation beneficiaries may be entitled to under the judgment herein shall bear interest at the legal rate from the date of judicial demand.

IT IS THE FURTHER ORDER OF THE COURT that with respect to any amounts of compensation benefits or medical expenses which Argonaut Insurance Company may be obligated to pay subsequent to date of payment of judgment herein and which are caused by the accident involved in this litigation, Shell Oil Company shall assume such payments in the place of Argonaut.

APPENDIX "J"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY OLSEN AS ADMINISTRATRIX OF THE SUCCESSION OF KENNETH MAHANEY, etc., et al.	CIVIL ACTION NO. 70-1240
versus	SECTION B
SHELL OIL COMPANY, et al	
CHRISTINE W. CARVIN, AS ADMINISTRATRIX OF THE ESTATE OF, AND WIDOW OF HER LATE HUSBAND JOSEPH R. CARVIN, SR., etc., et al.	CIVIL ACTION NO. 70-2986 SECTION B
versus	
SHELL OIL COMPANY, et al.	
FRANK WINSTON BOOKER and MRS. MINNIE LEONARD BOOKER, his wife	CIVIL ACTION NO. 71-894
versus	SECTION B
SHELL OIL COMPANY, et al	
GORDON DAVIS WALLACE	CIVIL ACTION
versus	NO. 71-1144
SHELL OIL COMPANY, et al.	SECTION B
ARGONAUT INSURANCE COMPANY	CIVIL ACTION

versus NO. 71-1265

SHELL OIL COMPANY, et al. SECTION B

(CONSOLIDATED CASES)

JUDGMENT

These consolidated cases came on for hearing before the Honorable Frederick J. R. Heebe, Chief District Judge, to review the Special Master's Proposed Findings and Recommendations with respect to the issue of quantum. The Court having duly considered the parties' briefs and arguments, and having duly rendered a decision affirming in part and modifying in part the Special Master's Proposed Findings and Recommendations, and the Court having granted the motion of Shell Oil Company for entry of judgment against Movible Offshore, Inc., on the third party complaint,

IT IS ORDERED, ADJUDGED AND DECREED:

1) that there be judgment in favor of Christine W. Carvin, individually and in her representative capacity, and against Shell Oil Company for the sum of $771,487.67;

2) that out of such award to plaintiff Christine W. Carvin, and in preference thereto, Argonaut Insurance Company be awarded the sum of $39,674.72, said amount representing those compensation benefits and burial expenses paid by Argonaut Insurance Company as of December 17, 1979, resulting from the death of Joseph R. Carvin, together with any such other amounts of compensation benefits which may have been paid by Argonaut Insurance Company to the date of payment of judgment herein for the death of Joseph R. Carvin;

3) that upon payment of said award to Argonaut Insurance Company, pre-judgment interest be awarded and assessed on that amount remaining to plaintiff Christine W. Carvin at the rate of 7% per annum from date of judicial demand to September 12, 1980, at the rate of 10% per annum from September 13, 1980, to September 11, 1981, inclusive, and at the rate of 12% per annum from September 12, 1981, until paid;

4) that there be judgment in favor of Mary Olsen Haun, in her representative capacity, and against Shell Oil Company for the sum of $16,000.00;

5) that out of such award to plaintiff Mary Olsen Haun, and in preference thereto, Argonaut Insurance Company be awarded the sum of $16,000.00, said amount representing a portion of those compensation benefits and burial expenses paid by Argonaut Insurance Company as of December 18, 1979, resulting from the death of Kenneth E. Mahaney (Olsen);

6) that there be judgment in favor of Argonaut Insurance Company and against Shell Oil Company for any and all compensation benefits paid as a result of the death of Kenneth E. Mahaney and which were not reimbursed to Argonatu Insurance in ¶ 5;

7) that plaintiff Gordon Davis Wallace be awarded the sum of $88,092.02;

8) that out of such award to plaintiff Gordon Davis Wallace, and in preference thereto, Argonaut Insurance Company be awarded the sum of $8,750.91, together with any such other amounts of compensation benefits which may have been paid by Argonaut Insurance Company to

date of payment of judgment herein for the injuries sustained by Gordon Wallace;

9) that upon payment of said award to Argonaut Insurance Company, pre-judgment interest be awarded and assessed on that sum remaining to plaintiff Gordon Davis Wallace at the rates specified in ¶ 3;

10) that there be judgment in favor of Argonaut Insurance Company and against Shell Oil Company for the amount of $1,000.00, that sum representing those compensation benefits and burial expenses paid by Argonaut Insurance Company resulting from the death of Robert L. Booker;

1) that there be judgment in favor of Argonaut Insurance Company and against Shell Oil Company for the amount of $69,302.12, said sum representing compensation benefits and medical expenses paid by Argonaut Insurance Company as of December 12, 1979, resulting from the injuries sustained by Raymond D. Louviere, plus such other amounts of compensation benefits and medical expenses which may have been paid by Argonaut Insurance Company since December 12, 1979, to the date of payment of judgment herein for the injuries sustained by Raymond D. Louviere;

12) that there be judgment in favor of Argonaut Insurance Company and against Shell Oil Company for the amount of $2,121.02, said sum representing compensation benefits and medical expenses paid by Argonaut Insurance Company as a result of the injuries sustained by George M. Parker;

13) that there be judgment in favor of Argonaut

Insurance Company and against Shell Oil Company for compensation benefits and medical expenses paid by Argonaut Insurance Company as of January 3, 1980, resulting from the injuries sustained by Charles J. Martinez;

14) that there be judgment in favor of Argonaut Insurance Company and against Shell Oil Company for interest on each of the awards enumerated in ¶¶ 2, 5, 6, 8, and 10-13 above, at the rate specified in ¶ 3;

15) that defendant Shell Oil Company shall assume payment of any amounts of compensation benefits or medical expenses whicch Argonaut Insurance Company may become obligated to pay subsequent to the date of payment of judgment herein for the injuries sustained as a result of the accident involved in this litigation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

16) that there be judgment in favor of Shell Oil Company and against third party defendant Teledyne Movible Offshore, Inc., for full indemnity, including but not limited to reimbursement for all amounts paid to plaintiffs herein as personal injury and wrongful death awards and as compensation benefits, amounts paid as reimbursement to Argonaut Insurance Company, amounts paid as interest due on the amounts awarded herein, attorney fees, and all costs of defense of these consolidated actions. The parties are to reach an agreement on this issue within thirty days of entry of judgment, and absent such an agreement within thirty days, the Court ORDERS the matter resolved by a hearing before a United States Magistrate.

New Orleans, Louisiana, this 21st day of May, 1982.

UNITED STATES DISTRICT JUDGE

APPENDIX "K"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3363

MARY OLSEN, Etc.,
CHRISTINE W. CARVIN, Etc.
GORDON DAVIS WALLACE,
and ARGONAUT INSURANCE COMPANY,

Plaintiffs-Appellees,

versus

SHELL OIL COMPANY,

Defendant-Appellant-Appellee,

versus

TELEDYNE MOVIBLE OFFSHORE,

Defendant-Appellant.

Appeals from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion JULY 5, 5 Cir., 1983, __ F.2d __)

(September 26, 1983)

Before GEE, REAVLEY and HIGGINBOTHAM, Circuit

Judges.

PER CURIAM:

(X) Treating the suggestions for rehearing en banc as petitions for pannel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Office-Supreme Court, U.S.
FILED
DEC 10 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-828
NO. 83-829

In the Supreme Court of the United States

OCTOBER TERM, 1983

SHELL OIL COMPANY,
TELEDYNE MOVIBLE, INC.,

Petitioners,

V.

MARY OLSEN, CHRISTINE W. CARVIN,
GORDON DAVIS WALLACE, and
ARGONAUT INSURANCE COMPANY

Respondents.

DEATH AND INJURY CLAIMANTS' RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

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RESPONSE BY DEATH AND INJURY CLAIMANTS TO PETITION FOR CERTIORARI

Mary Olsen, Christine Carvin and her children, and Gordon Davis Wallace, death or injury claimants, respond to the petitions for certiorari:

1. So far as these people are concerned there is nothing to the petitions.

They present nothing for review. They are exaggerations and distortions of factual minutiae in an attempt to create an appearance of writ-worthiness.

2. These people have nothing to do with the compensation law now. They have all been comped out; or the amortization of their judgment on a weekly basis makes further consideration of their comp interest moot.

3. None are drawing compensation except Christine Carvin, widow, and as soon as there is money in hand credit by amortization will exceed her life span.

4. After thirteen years the petitioners see the best way to drive the hardest bargain for settlement of the award of prejudgment interest is to take the case as far as they can regardless of merit. This is the second petition for certiorari in this case.

5. The decision is not in conflict with those of this Court; the opinion tends to support it.

6. The decision is not in conflict with the Shelf Act nor the intent of Congress. Congress intended a multiplicity, not a uniformity as intended by the Jones Act and

required by the maritime law. This is a shore-side case governed by shore-side law. The decision can be rationalized with past decisions of the Circuit Court; if not, conflict between panels of a circuit is no grounds for certiorari. *Davis v. The United States*, 417 U.S. 333, 340, (1974); *Wisniewski v. The United States*, 353, U.S. 901, 902, (1957).

7. The award of prejudgment interest was a highly personalized equity in a case of extreme circumstances; there is no major question of widespread public importance here. Prejudgment interest was bestowed as an equity and decided merely on the ground of equity. The assertions to the contrary in one or both of the petitions are an attempt to create an illusion of writ-worthiness. In every case following this, the district courts may under the rationale of the decision deny prejudgment interest on a factual basis that is not subject to appellate review. If the point had gone against the respondents below, it would have set nothing for reivew on appeal. To say that such prejudgment interest is now mandated in all future cases is distortion, willful or not.

8. So far as cert-worthiness is concerned this may be the first and last case where prejudgment interest is allowed. The equity here is patent to the extraordinary.

If the point must be considered at law, then:

9. The acid test:

If the general federal statute concerning post-judgment interest on all judgments were followed by an act of Congress pertaining only to the Shelf itself stating that in only tort cases only on the Shelf interest shall run from

date of judicial demand rather than from judicial entry of judgment, would there be a hopeless inconsistency or viceral repugnancy that would work a repeal of the general statute because of inconsistency? Obviously not; to state the question is to answer it.

10. Whether two statutes are inconsistent depends upon whether one would impliedly repeal the other on the ground of repugnancy. *State v. Gledhill*, 342 A2d 161, 169, (N.J. 1975).

11. It is well settled that repeals by implication are not to be favored; and where two statutes cover in whole or part the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. *Frost v. Wennie*, 15 S.Ct. 532, 39 L.Ed. 614 (1895), Mr. Justice Harlan speaking for a unanimous court.

12. Where both acts are affirmative and their substance are such that both may stand together, both are held to be in force.

Both the state and the federal interest statutes are affirmative, they bestow, they do not take away, and the substance of both may stand together. To reach petitioners' conclusion, the statute must read by implication that interest shall run from the date of judgment and *only* from the date of judgment. There is neither principle, policy nor history to support this.

13. Arguments for repeal by implication are especially disfavored where the previous statute is not stale or forgotten. This Court has held the prejudgment interest of the Louisiana statute shall be awarded in diversity cases;

its denial in FELA and Jones Act and maritime cases is only required because of the over-riding consideration of uniformity. Congress in working up the Shelf Act looked at the uniformity of the maritime law as a basis of surrogate law and cast it aside preferring multiplicity: the man on platform offshore Louisiana gets the same thing the man on shore Louisiana gets, the same injury, the same hurt, the same interest; and the same respectively for Texas, Mississippi, Alabama, Florida and the East Coast.

14. This Court has recognized this in rejecting maritime law as a basis for adjudication of these platform cases in allowing platform cases to be brought both in state and in federal court. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870 (1981).

15. Where two acts cover the same subject matter both should be given effect if at all possible. *Leitz v. Fleming*, 264 F.2d 311, *cert.d.*, (1959)

16. Construction of a statute as having been repealed by implication—and the argument of petitioners is that the state statute would have the effect of repealing the federal statute on the question of interest—is one that should rarely be indulged and should, in any event, have only a limited application. *U.S. v. Holmes*, 188 F.2d 222 (6th Cir.,1951)

17. An act is not impliedly repealed because of conflict, inconsistency or repugnancy between it and a later act unless the conflict, inconsistency or repugnancy is plain, unavoidable and irreconcilable. 82 C.J.S. *Statutes* Sec. 291(b), p. 492.

18. Where both statutes are positive, where both can be satisfied by the same deed, there is not irreconcilable

conflict. The "deed" here, bestowal of interest from the date of judicial demand, satisfies both statutes.

19. Congress intended that applicable state law be used to fill any gap in whatever body of federal law might be pertinent to a particular case, provided such state law was not inconsistent with the federal scheme. *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 358 (1969). Since the federal statute is silent as to prejudgment interest, there is no conflict unless such silence generates an implied restriction. There is no basis for such implied restriction. There is neither history nor logic for reading the federal statute so that interest shall run *only* from the date of entry of judgment. *Illinois Central Railway v. Texas Eastern Transportation Can Corporation*, 551 F.2d 943, (5th Cir. 1977).

20. A natural equation, "A=B when C=D," is never read "*only* when C=D," unless laws of nature compel it. Nothing compels it here, man nor nature. The statutes are not at odds, but rather operate in a complimentary fashion.

21. The Fifth Circuit has recognized this. *Illinois Central Railway Company v. Texas Eastern Transmission Corporation*, 551 F.2d 943, (5th Cir., 1977). Accord. *Louisiana and Arkansas Railway Company v. Export Drum Company*, 359 F.2d 311, 316-17 (5th Cir. 1966); *Crawford v. Roadway Expressway, Inc.*, 485 F.Supp. 914, 925 (W.D., La. 1980); See also, *New Amsterdam Casualty Company v. Soileau*, 167 F.2d 767, 771-72 (5th Cir., 1948); *Glens Falls Insurance Company v. Danville Motors, Inc.*, 333 F.2d 187, 191 (6th Cir.,1964); *In re: Air Crash Disaster Near Chicago, Illinois*, 480 F.Supp. 1280, 1282 (N.Dist.Ill.,1979), *aff'd*, 64 F.2d 633, 7th Cir. 1981; *Oresman v. G. D. Searle & Co.*, 388 F.Supp. 1175, 1178, (Dist. Crt. R.I.,1975); *Ryan v. Ford*

Motor Company, 334 F.Supp. 674, (D.Mich.1971).

22. The Fifth Circuit implicitly acknowledged that its prior holdings lacked precedent on the point of prejudgment interest. *Ellis v. Chevron, U.S.A.*, 650 F.2d 94, 98 (5th Cir., 1981).

23. In the present case, petitioners asked the entire court of the Fifth Circuit to reverse the panel decision, which request was denied.

24. This point is further illustrated by admiralty cases which hold that 28 USCA 1961 is applicable to such cases. *Gele v. Wilson*, 616 F.2d 146, 148 (5th Cir. 1980).

25. The Fifth Circuit itself has held that "inconsistent" means contradictory in the sense of legislative provisions that can not co-exist and thus held that a statute which set out a minimum standard did not conflict with regulations going beyond the statutory minimum to establish stricter requirements. *E. B. Elliott Advertising Company v. Metropolitan Dade County*, 425 F.2d 1141, 1150 (5th Cir. 1927) *cert.d.*

26. Prejudgment interest under the Louisiana law is awarded as a form of damages; not as rent for the wrongful detention of money, the failure to pay a judgment. *Morgan & Bell 4* Mart. O.S. 615 (La.1817), *See Friede v. Myles Salt Co., Ltd.*, 177 So.105 (La.App.,1937) for history . See also, *Ladroeux v. Marsoudet*, 4 La. Ann. 334 (1848); prejudgment interst "*may be allowed by way of damages.*"

27. It is governed by a particular statute that concerns only tort judgments. La. R.A. 13:4203: "Legal interest shall attach from date of judicial demand, on all

judgments, sounding in damages, "ex delicto," which may be rendered by any of the courts."

28. Prejudgment interest under state law runs only from the date of judicial demand as a damage award, not from the date of casualty. The two statutes, federal and state, do not pertain to the same thing and do not overlap. For this reason, if no other reason, there can be no inconsistency.

29. Not "inconsistent" does not mean "identical." The meaning of the term "inconsistent" has been judicially settled long ago. Congress knew that when it passed this surrogate law; it is presumed to have been well aware. The meaning given the term "inconsistent" wrought by this Court over a century ago pertaining to statutes is conclusively applicable.

30. If the question can be looked at two ways, certainly it should be decided in favor of allowing both statutes to stand.

31. The Congressional policy favoring state law is strong here.

32. Since there is no need for uniformity and since the intent of Congress is done, not undone, by this award of prejudgment interest, both statutes should stand.

33. In the beginning neither under the Louisiana Civil Law nor the common law did tort judgments bear interest from any date, though post-judgment interest might be obtained for "the detention of the debt" by a suit on the judgment itself.

34. An interpretation of a Congressional act that has sevearal purposes is best satisfied by that which will accommodate all purposes; here, the allowance of prejudgment interest as damages and the allowance of post-judgment interest as a rent for the "detention of the debt."

35. To find inconsistency here it must be eagerly sought, contrary to the rules governing interpretation and construction of the phrase "not inconsistent" and the statutes employing it, to say nothing of the intent of Congress.

36. Congressional history shows that both sides of the aisles of Congress strongly desired that state law govern damage claims under the Shelf Act; thus the point here comes under the friend-and-foe rule of this Court, that where both friend and foe in Congress intend that, if a bill passes at all, it will carry a particular feature, then such history is conclusive that such feature is clearly implied if not expressed in the law. *First National Bank of Logan, Utah v. Walker Bank and Trust Company,* 81 S.Ct. 492, 385 U.S. 252, 17 L.Ed.2d 343, *reh.d.*

37. Incorporation of state law into the Shelf Act builds its own *Erie* doctrine into the federal statute making an award of prejudgment interest correct. *New Amsterdam Casualty Company v. Soileaux,* 167 F.2d 767, 771-72 (5th Cir. 1948)

38. Since neither civil nor common law provided for interest on tort judgments, both state and federal statutes awarding interest are positive, neither negative.

39. A final word about an argument that these respondents are not technically required to answer: that

these people will be double-dipping. They will get no only damages, but compensation too. Where this distortion came from or how it arose is unknown. It can not be answered because it cannot be understood. The factual answer is this: for thirteen years of litigation, the ever present intervenor has ridden the coat tails of these people, not putting out a dime to finance the litigation, not doing a minute's work, and now will get every dime of its money back from the people who are the death and injury claimants of this suit from the damages they are awarded.

The petitions should be denied.

WILLIAM P. RUTLEDGE
Attorney for Respondents,
Mary Olsen, Christine W.
Carvin and her children, and
Gordon Davis Wallace,
Death and Injury Claimants.

CERTIFICATION

I DO HEREBY CERTIFY that on the 9th day of December, 1983, that three copies of this response were mailed postage prepaid to counsel for Shell Oil Co., John Cherrier, 225 Baronne St., 28th Floor, New Orleans, Louisiana and counsel for Teledyne Movible, Inc., W. K. Christovich, 1900 American Bank Building, New Orleans, Louisiana.

WILLIAM P. RUTLEDGE